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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,
PETITIONERS,

-vs-

BERNARD SMITH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

After a 4-day evidentiary hearing, the state trial court rejected Bernard Smith's (hereafter Smith) claim of ineffective assistance of sentencing counsel finding that Smith's sentence would have been the same even if his attorney had presented evidence of Smith's sociopathic personality, his drug history, his change in personality after a drug overdose, his family relationship at the time of the murder, and his love of his children and his support of them. (Appendix C, at 1-4). The Ninth Circuit reversed, finding that the above listed mitigation "undermined" the court's confidence in the sentencing process; and, therefore, Smith was entitled to a resentencing. (Exhibit A, at 12–13.) The Ninth Circuit's opinion did not accord the state trial judge's factual determination the presumption of correctness under 28 U.S.C. § 2254(d)(8). Petitioner maintains that the Ninth Circuit's opinion raises the following questions:

1. Was the state trial judge's factual determination made at the end of a post-conviction relief evidentiary hearing, that even with the non-presented mitigating evidence, Smith would still have been sentenced to death, entitled to the presumption of correctness under 28 U.S.C. § 2254(d)(8), when that same trial judge would have resentenced Smith—had he found Smith's counsel ineffective and granted Smith a new sentencing?

2. Did the Ninth Circuit Court disregard the prejudice standard of *Strickland v. Washington* by ordering Smith resentenced after stating they could not find that Smith's counsel's challenged conduct caused Smith to receive a death sentence rather than life in prison?

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CAPITAL CASE

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is not yet published; a copy is included in Appendix A. The order of the district court is not published; it is included in Appendix B.

STATEMENT OF JURISDICTION

Petitioners respectfully request that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit issued on April 7, 1998. Petitioners have timely filed this petition for writ of certiorari within 90 days of the decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

FEDERAL STATUTES

28 U.S.C. § 2254(d) (pre-1996 amendment):

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by State court of competent jurisdiction in proceeding to which the application for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court, on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that he factual determination by the State court was erroneous.

28 U.S.C. § 2254(e)(1) (as amended 1996):

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

Arizona Rules of Criminal Procedure

Rule 32.1. Scope of remedy

Subject to the limitations of Rule 32.2, any person who has been convicted of, or sentenced for, a criminal offense may, without payment of any fee, institute a proceeding to secure appropriate relief on any of the following grounds:

> a. The conviction or the sentence was in violation of the Constitution of the United States or of the State of Arizona;

Rule 32.4. Commencement of Proceedings

> e. Assignment of Judge. The proceeding shall be assigned to the sentencing judge where possible. If it appears that the sentencing judge's testimony will be relevant, that judge shall transfer the case to another judge.

STATEMENT OF THE CASE

In April of 1983, Smith was paroled by the State of California. Smith traveled to Yuma, Arizona, and lived with his mother, step-father, and several siblings. By August 21, 1983, Smith had robbed several convenience markets. On August 21, 1983, near midnight, Smith entered the Low Cost Market in Yuma, pointed a gun at the clerk, Charles Pray, and told him to "Give me all of the money or I will blow your fucking head off." Instead of giving Smith the money, Pray twice called out his manager's name. Smith responded by shooting Pray in the neck. Smith removed the money from the cash register and left the store to his waiting car and fled the murder scene.

Thirteen minutes later, a deputy sheriff stopped Smith. Smith still had the revolver and a roll of blood-stained bills in his car. When arrested, Smith was in fine mental and physical condition. Initially, Smith claimed the gun and money belonged to a hitchhiker that he had picked up when he stopped at an intersection close to the grocery store. When Smith learned that two women had followed him through the intersection and would testify that he had not stopped at the intersection to pick up a hitchhiker, Smith changed his story and claimed that the robber was someone named "Al Johnson," who had come to Yuma to engage Smith in the manufacture

of PCP. Smith admitted that he and Johnson had stopped at the Low Cost Market. Smith admitted entering the market, and he claimed that he purchased cigarettes. When he came out of the store, Johnson entered the market. When Johnson returned, he was carrying a gun, and he told Smith he had shot a "guy." The two drove to the Elks club. Johnson went into the club but left his gun and bloody money in Smith's vehicle—thus explaining the presence of the gun and money in Smith's car at the time of his arrest. Charles Pray died several weeks later.

A jury found Smith guilty of first-degree murder and armed robbery. Judge Nabours found five aggravating circumstances: (1) three prior felony convictions for which a life or death sentence could be imposed, A.R.S. § 13-703(F)(1); (2) prior conviction involving the use or threat of violence on another person, § 13-703(F)(2); (3) creation of a grave risk of death to a person other than the victim, § 13-703(F)(3); (4) expectation of pecuniary gain, § 13-703(F)(5); and (5) the fact that Smith committed the offense in an especially heinous, cruel, or depraved manner, § 13-703(F)(6). Judge Nabours did not find any mitigating circumstances and sentenced Smith to death. The Arizona Supreme Court affirmed the judgments of guilt and sentences. The court found that the trial court erred in finding that Smith had created a grave risk of death to another person, and that the murder was committed in an especially heinous, cruel, or depraved manner. The court affirmed Judge Nabours' findings concerning the other aggravating circumstances, and the fact that the record did not contain any evidence of mitigating circumstances. The court concluded that a remand for a new sentencing was unnecessary. *State v. Smith*, 707 P.2d 289, 299, 302-03 (1985).

Smith filed three state post-conviction (Rule 32) relief petitions. Judge Nabours dismissed the first Rule 32 petition. Judge Bradshaw—Judge Nabours had retired—dismissed the second petition. Judge Bradshaw conducted a 4-day evidentiary hearing on Smith's third Rule 32 petition. During the evidentiary hearing, Smith called witnesses attacking the competency of his trial counsel at both the trial and sentencing phases. At the conclusion of the evidentiary hearing, Judge Bradshaw rejected Smith's claim that he was entitled to post-conviction relief on the grounds that his trial counsel was ineffective at sentencing because:

> . . .if all of the information brought forth in the hearings here had been brought out at the mitigation hearing, a preponderance of the evidence would not show childhood, parental abuse;

> mental infirmity or inability to understand the quality or nature of his acts or to act in conformity to the law.

(Appendix C, at 3.) Thus, even if the non-offered mitigating evidence—developed during the post-conviction evidentiary hearing—had been presented at Smith's sentencing, Smith still would have been sentenced to death.

Smith filed a petition for review with the Arizona Supreme Court challenging the trial court's denial of post-conviction relief. After reviewing the proceedings held by Judge Brawshaw, the Arizona Supreme Court denied review.

Smith then filed an amended petition for writ of habeas corpus in federal district court alleging various claims, including the assertion that his trial counsel was ineffective during sentencing. District Judge Broomfield concluded that Smith was not entitled to relief on the grounds his trial counsel was ineffective:

> . . .the Court finds that even if trial counsel had presented the evidence and arguments which Petitioner claims he should have, there is not a reasonable probability that Petitioner would have received a life sentence.

(Appendix B, at 11.)

On April 7, 1998, the Ninth Circuit Court issued its opinion. The court held that Smith's trial counsel was not ineffective at the trial phase but was ineffective at sentencing. The court concluded that Smith was prejudiced by his counsel's conduct during sentencing and that "our confidence in the sentencing result has been undermined" and as a result ordered Smith resentenced. In concluding that Smith was prejudiced by his counsel's failure to develop and offer the mitigation developed during the Rule 32 evidentiary hearing, the court stated "We do not say that any of the above considerations were so powerful that they must have led to a life sentence rather than a sentence of death." The Ninth Circuit further noted that "these factors, even as now developed, do not demand a life sentence rather than a sentence of death." (Appendix A, at 8, 12.)

In remanding for a new sentencing—thereby adding years to the process, the court noted that the Rule 32 mitigation evidence might have

different effects on different judicial officers. (*Id.* at 9.) The court further indicated that "Had the judge who heard the post-conviction proceeding also been the trial and sentencing judge, we would be considerably less inclined to order relief, for that might at least approach a 'looking-glass exercise in folly'" (citation omitted). (*Id.* at 12.) As it turned out, it was a different judge. Judge Nabours, the sentencing judge, had retired by the time of Smith's third petition for post-conviction relief petition. Had Judge Bradshaw, who conducted the third post-conviction relief proceeding, ordered a new sentencing, he would have been the resentencing judge.

REASONS FOR GRANTING THE WRIT

I

THE STATE TRIAL COURT'S FACTUAL DETERMINATION AT THE CONCLUSION OF SMITH'S POST-CONVICTION RELIEF HEARING THAT SMITH WOULD HAVE STILL HAVE BEEN SENTENCED TO DEATH EVEN IF THE NON-OFFERED MITIGATING EVIDENCE HAD BEEN PRESENTED AT HIS SENTENCING WAS ENTITLED TO THE PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. § 2254(d)(8) WHEN THE TRIAL JUDGE WHO DENIED SMITH POST- CONVICTION RELIEF WOULD HAVE BEEN THE RESENTENCING JUDGE.

Under 28 U.S.C. § 2254(d)(8), a state court's factual findings are "presumed to be correct" if "fairly supported by the record." This Court has repeatedly held that a state court's factual findings are entitled to a "high measure of deference." *E.g. Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 455 U.S. 591, 598 (1982). A federal court may not overturn such a factual determination on habeas corpus review unless it concluded that the factual finding is not supported by the record. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990). The petitioner has the burden of demonstrating by clear and convincing evidence that the facts are erroneous. *Sumner v. Mata*, 449 U.S 539, 550 (1980). State court findings of fact are entitled to *at least* as much deference on federal habeas corpus review as are district court factual findings, and probably more. *Wainwright v. Witt*, 469 U.S. 412, 428–429 (1985); *Patton v. Yount*, 467 U.S. 1025, 1038 (1984); *see also Hernandez v. New York*, 500 U.S. 352, 369 (1991) (it "would pervert the concept of federalism to conduct a more

searching review of findings made in state trial court than we conduct with respect to federal district court findings"). Applying a presumption of correctness to factual findings by state courts promotes comity between the federal and state courts. *Sumner,* 449 U.S. at 550. The principle of presumption of correctness applies to findings that are made at the conclusion of post-conviction relief proceedings. *Rushen v. Spain*, 464 U.S. 114, 120 (1983).

On the other hand, issues involving both questions of fact and federal constitutional law are considered "mixed questions of fact" and are not entitled to a presumption of correctness under 28 U.S.C. § 2254(d), but will be determined independently by the federal courts. *Thompson v. Keohane*, ___ U.S. ___, 116 S. Ct. 457, 464 (1995); *Miller v. Fenton*, 474 U.S. 104, 112 (1985). As this Court noted in *Thompson*, the distinction between what constitutes a question of fact entitled to a presumption of correctness and mixed questions of law and fact "is sometimes slippery." 116 S. Ct. at 464. The following claims have been found to be questions of fact and thereby entitled to the presumption of correctness: competency to stand trial (*Maggio v. Fulford*, 462 U.S. 111, 117 (1983)); juror impartiality (*Wainwright v. Witt*, 469 U.S. 412, 429 (1985)); question of whether a witness has been granted immunity (*Burden v. Zant*, 498 U.S. 433, 436-37 (1991)); and the "substance of *ex parte* communications and their effect on juror impartiality (*Rushen*, 464 U.S. at 120).

The voluntariness of a confession (*Miller v. Fenton*, 474 U.S. 104, 116 (1985)); if a pretrial identification procedure was unduly suggestive (*Sumner*, 455 U.S. at 597); whether defendant waived counsel (*Brewer v. Williams*, 430 U.S. 387, 397 (1977)); and whether a defendant was in custody for purposes of requiring *Miranda* warnings, (*Thompson*, 116 S. Ct. at 467) have been found to be mixed questions of law and fact and therefore not entitled to a presumption of correctness. Consequently, issues where the determination of the claim centers on the credibility of witnesses are generally classified as historical facts, while claims which require the application of facts to legal principles fall within the category of a mixed questions of fact and law. *Thompson*, 116 S. Ct. at 465.

Judge Bradshaw's finding that Smith's death sentence would have been the same even if the non-offered mitigating evidence had been presented at Smith's sentencing was a question of fact entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Judge Bradshaw

of the Yuma County Superior Court conducted a 4-day evidentiary hearing on Smith's third Rule 32 petition. Because Judge Nabours, the sentencing judge, had retired, Judge Bradshaw conducted the evidentiary hearing.[1] After listening to 21 witnesses as Smith attacked the effectiveness of his trial arguing the death penalty was inappropriate in his case, Judge Bradshaw issued written factual findings concerning Smith's claim that his trial counsel was ineffective during the sentencing phase. Judge Bradshaw discussed the "Potential Mitigating Circumstances" that Smith claimed his trial counsel was remiss in not developing and presenting during sentencing:

XII. POTENTIAL MITIGATING CIRCUMSTANCES:

Petitioner now claims that the trial judge should have considered the following as mitigating circumstances:

1. The facts and circumstances of the shooting.
2. The victim's failure to follow orders and give Petitioner the money.
3. The nervousness of the Petitioner when he fired the weapon.
4. Petitioner's extensive use of drugs.
5. Whether Petitioner could be rehabilitated and become a productive member of society.
6. Petitioner's troubled childhood.
7. Petitioner's poverty.
8. Petitioner' lack of education.
9. Proportionality of the death sentence in this case.
10. The possibility that the killing may have been accidental.
11. The cumulative effect of the above.

The record reflects that the trial judge did consider the circumstances surrounding the shooting.

---

1. On February 17, 1984, Judge Nabours sentenced Smith. On January 31,1989, Smith filed his third Rule 32 petition.

While there is evidence from the Petitioner of his extensive use of drugs, there is no evidence that he was either (a) under the influence of drugs, or (b) that his use of drugs affected his ability to distinguish right from wrong, or (c) that his use of drugs diminished his ability to conform his conduct as required by law, at any relevant moment. In fact, the evidence would have supported a finding beyond a reasonable doubt that the Petitioner was neither affect (sic) by nor under the influence of drugs at the time the offense was committed. This man had no other physical or mental impairment at the time the offense was committed.

The Petitioner's troubled childhood, lack of formal education and poverty may not have been considered by the trial judge because the record clearly shows that these were not presented to him. Petitioner's mother has now testified about his childhood and her testimony sharply conflicts with his concerning the allegations of abuse and dysfunctional family. Petitioner's own testimony suggest that he was not working at the time of the offense, but does not show poverty at the time of the incident, nor true poverty in youth.

While the trial judge may, or may not have made a proportionality review, such has been done by the Supreme Court and decided adversely to the Petitioner.

Neither the record, nor the verdict of the jury has within it any suggestion that the shooting was other than the intended act of a person who could and did make a reasoned decision to pull the trigger.

(Appendix C, at 1-2.)

In rejecting Smith's claim that his counsel was ineffective at the sentencing phase, Judge Bradshaw found:

XIII. EFFECTIVE ASSISTANCE OF COUNSEL—SENTENCING:

The only matter presented here which was not brought out above is that his family loved the Petitioner. Counsel did talk

with the Petitioner's mother prior to sentencing. He was of the opinion that placing her on the witness stand would show that: (a) Petitioner's childhood was not one of abuse or of family problems, but one which was normal; (b) that Petitioner had not spent a lot of time with the family over the several years prior to the crime; (c) that Petitioner had mentioned to his mother that he might rob someone; (d) or that his life was greatly changed by use of drugs, and that none of these things was beneficial to the Petitioner.

Certainly Petitioner's mother loves him. This is a situation that is inherent.

However, if all of the information brought forth in the hearings here had been brought out at the mitigation hearing, a preponderance of the evidence would not show childhood, parental abuse; mental infirmity or inability to understand the quality or nature of his acts or to act in conformity to the law.

Since even the things presented show clearly that the Petitioner could, and did recognize what he was doing and that such was wrong but chose not to follow the course of action which he knew was proper, they would not have been different at sentencing, and this was obvious to counsel.

(*Id.* at 3.)

Judge Bradshaw then denied Smith post-conviction relief—including a new sentencing.

On collateral review, District Court Judge Broomfield rejected Smith's claim that "if trial counsel had presented the evidence and arguments which Petitioner claims he should have, there is not a reasonable probability that Petitioner would have received a life sentence." (Appendix B, at 11.)

Had Judge Bradshaw granted Smith's request for post-conviction relief and granted him a new sentencing, Judge Bradshaw would have been the sentencing judge. *See* Rule 32.4(e) of the Arizona Rules of Criminal Procedure; *Gerlaugh v. Stewart*, 129 F.3d 1027, 1036 (9th Cir. 1997); *State ex rel Corbin v. Superior Court*, 138 Ariz. 500, 5003, 675 P.2d 1319, 1322 (1984). Judge Bradshaw considered the evidence—personality

problem of sociopathy, prior drug use, good family relationships, and the existence of Smith's children—during the post-conviction relief evidentiary hearing and concluded that even with this information Smith's sentence would be the same. (Appendix C, at 3-4.) Whether Smith was under the influence of drugs, whether his drug use affected his conduct on the night in question, the nature of Smith's childhood—including his alleged claim of parental abuse—and what, if any, effect it may have had on his conduct at the time of the murder, family relationships were all issues that hinged upon the credibility of the witnesses that appeared before Judge Bradshaw.

While this Court in *Strickland v. Washington*, 466 U.S. 668, 698 (1984), held the ineffective assistance of counsel claim is a mixed question, Judge Bradshaw's conclusion that the sentence would have been the same was a factual finding independent of the decision of whether Smith's lawyer was ineffective and therefore entitled to the presumption correctness. *See Sumner*, 455 U.S. at 597 ("questions of fact that underlie" ultimate conclusions are entitled to the presumption of correctness unless they are "not fairly supported by the record.") Merely because the resolution of an issue resolves the ultimate constitutional question does not automatically classify that matter as a question of law. *Miller*, 474 U.S. at 113. Whether the death penalty was appropriate in Smith's case after considering the aggravating and mitigating evidence was a factual question, and thereby should have presumed correct absent a showing the conclusion, is not supported by the record. 28 U.S.C. §2254(d)(8); *Parker v. Dugger*, 498 U.S. 308, 320 (1991) (trial judge's finding of aggravating and mitigating circumstances are entitled to the presumption of correctness); *Lewis v. Jeffers*, 497 U.S. 780, 782 (1990) (imposition of death penalty will be upheld by federal courts if a rational factfinder could have found the existence of aggravating circumstances). Thus, Judge Bradshaw's determination that the death penalty would have still been imposed had the mitigation evidence been offered was a factual determination entitled to a presumption of correctness pursuant to 28 U.S.C. §2254(d)(8). The court's refusal to apply the presumption of correctness to Judge Brawshaw's finding that the death penalty would still have been imposed had the mitigation evidence been offered ignored the presumption of correctness doctrine of 28 U.S.C. §2254(d).

II

THE NINTH CIRCUIT COURT OF APPEALS DISREGARDED THE PREJUDICE REQUIREMENT OF *STRICKLAND V. WASHINGTON* BY GRANTING SMITH A RESENTENCING WHEN THEY COULD NOT FIND THAT SMITH'S COUNSEL'S CONDUCT RESULTED IN SMITH RECEIVING A DEATH SENTENCE AS OPPOSED TO A LIFE SENTENCE.

Counsel's effectiveness is analyzed pursuant to the doctrine set forth in *Strickland*, 466 U.S. at 698. According to *Strickland*, there are two components to an ineffective assistance of counsel inquiry—ineffectiveness and resulting prejudice—and the defendant bears the burden of establishing both. 466 U.S. at 687. A defendant must show under the second prong of the *Strickland* test that he was prejudiced by his attorney's error such that the result of the proceeding was rendered fundamentally unfair or unreliable. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993); *Strickland*, 466 U.S. at 687–88. In other words, "absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." 466 U.S. at 695.

The Ninth Circuit did not apply the *Strickland* and *Fretwell* prejudice standard in ordering a new sentencing. The court did not require Smith to show, nor did it find, that his sentence would have been different had the mitigation evidence been presented. *Darden v. Wainwright*, 477 U.S. 168, 184 (1986) (to establish prejudice, defendant must show that the result would have been different). Although the court found that Smith had been prejudiced by his counsel's conduct at sentencing, the court acknowledged that, "We do not say that any of the above considerations (non-offered or developed mitigation) were so powerful that they must have led to a life sentence rather than to a sentence of death" and "recognize[d] that these factors, even as now developed, do not demand a life sentence rather than a sentence of death." (Appendix A, at 8.)

From the above, it is clear that in ordering Smith a new sentencing, the court failed to follow the prejudice standard of *Strickland* and *Fretwell*. The court acknowledged that it could not determine that, had the non-offered mitigation evidence been offered, Smith would have received a life sentence. The court did not utilize the *Strickland* and *Fretwell* prejudice

standard requiring Smith to demonstrate that his sentence would have been less than death or was "fundamentally unfair or unreliable" because of his counsel's shortcomings. If the court could not conclude that Smith's sentence would have been life had the mitigation been presented, then it does not follow that his counsel's conduct resulted in a sentence that was fundamentally unfair or unreliable.

The court's rationale is also inconsistent with other circuits—including another Ninth Circuit opinion—which require the habeas petitioner to show that his sentence would have been less severe but for his counsel's unprofessional conduct: *see e.g., Malone v. Vasquez*, No. 96-1613, 1998, WL111739 (Mo. 8th Cir. Mar. 11, 1998) (petitioner failed to establish prejudice prong of *Strickland* because he still would have received a death sentence had his counsel contacted defendant's family and presented psychological evidence); *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996) (counsel's failure to produce mitigation not prejudicial where court was not "persuaded" that petitioner would not have received the death penalty); *Elledge v. Dugger*, 823 F.2d 1439, 1447-48 (11th Cir. 1987) (even though counsel failed to investigate petitioner's past or present psychiatric testimony, petitioner failed to show prejudice because he still would have been sentenced to death); *Bolender v. Singletary*, 16 F.3d 1547, 1560-61 (11th Cir. 1994) (petitioner not entitled to habeas corpus relief because sentence would have been the same even if the attorney had offered the mitigating evidence); *Davis v. Executive Director of Dept. Corrections*, 100 F.3d 750, 766 (10th Cir. 1996) (Petitioner failed to establish prejudice because presentation of the evidence from family members, acquaintances, and expert on alcoholism would not have changed the death sentence); *Flamer v. State of Delaware*, 68 F.3d 710, 733-44 (3rd Cir. 1996) (failure of defense counsel to seek school records, call psychiatrist or psychologist, or introduce evidence of codefendant's history of violence did not prejudice petitioner because jury still would have imposed death penalty); *Edmonds v. Peters*, 93 F.3d 1307, 1321-22 (7th Cir. 1996) (counsel's closing arguments and further inquiry into petitioner's family history and failure to seek additional psychological examinations did not prejudice petitioner because these allegations of ineffectiveness would not have altered the imposition of the death sentence); *Barnes v. Thompson*, 58 F.3d 971, 980 (4th Cir. 1995) (even if petitioner's counsel had presented evidence of "abuse and dysfunction, it is unlikely that he would have satisfied *Strickland's* second requirement of a 'reasonable probability'" that petitioner's sentence would have been

other than death); *Clozza v. Murray*, 913 F.2d 1092, 1103 (4th Cir. 1990) (failure to recall witness during sentencing hearing did not prejudice petitioner because even with their testimony there was "no reasonable probability" that the death penalty would not have been imposed; *Woratzeck v. Stewart*, 97 F.3d 329, 336 (9th Cir. 1996) (where calling additional witnesses would not have resulted in a life sentence defendant will not be granted habeas corpus relief on the grounds of ineffective assistance of counsel during the sentencing process); *United States v. Workman*, 110 F.3d 915, 920 (2nd Cir. 1997) (defense counsel's consent to late delivery of presentence report and failure to interview defendant in preparation of the presentence report did not prejudice defendant because there was no reasonable probability that his sentence would have been different); *Green v. United States*, 65 F.3d 546, 551 (6th Cir. 1995) (defendant failed to establish prejudice prong of *Strickland* because challenged sentence was being served concurrently with a longer sentence); *United States v. Graham*, 91 F.3d 213, 220 (D.C. Cir. 1996) (defense counsel's failure to ask for downward departure concerning defendant's criminal history did not prejudice defendant because his sentencing score mandated a life sentence "regardless of defendant's criminal history score); and *Isabel v. United States*, 980 F.2d 60, 65 (1st Cir. 1992) (failure to argue "acceptance of responsibility reduction" not ineffective assistance of counsel because "any such argument had little chance of succeeding").

CONCLUSION

Judge Bradshaw, who conducted the post-conviction relief evidentiary hearing, concluded that even with the non-offered mitigation evidence Smith still would have been sentenced to death—District Judge Broomfield agreed. Had Judge Bradshaw concluded that Smith's counsel was ineffective and ordered a new sentencing, Judge Bradshaw would have been the judge to resentence Smith. Despite this, the Ninth Circuit ordered a new sentencing adding years to the process. By refusing to apply the presumption of correctness to Judge Bradshaw's factual determination that Smith would still have received a death sentence, the Ninth Circuit has failed to accord deference to the state court's finding of fact as required by 28 U.S.C.§ 2254(d)(8), undermined the finality of state criminal judgments, and disrupted the comity between the federal and state courts.

Despite the Ninth Circuit's holding that they were unable to conclude that defense counsel's conduct "must have led to a life sentence rather than a sentence of death" or that "these factors (non-offered mitigation) even as

now developed, do not demand a life sentence," the court nevertheless held their "confidence in the sentencing result has been undermined" and granted Smith a new sentencing. This result is at odds with *Strickland* and the other circuits—including a decision within the Ninth Circuit—that hold the prejudice prong of *Strickland* requires the defendant to show that his counsel's ineptness caused him to receive a more serious sentence.

Petitioners respectfully request this Court to grant certiorari and decide the important matters it presents.

Respectfully submitted,

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APPENDICES

APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNARD SMITH, *Petitioner-Appellant,*	)	No. 97-99006
v.	)	D.C. No. CV-87-634-RCB
TERRY STEWART, *Respondent-Appellee.*	)	OPINION

Appeal from the United States District Court
for the District of Arizona
Robert C. Broomfield, District Judge, Presiding

Argued and Submitted
March 9, 1998—Reno, Nevada

Filed April 7, 1998
Before: Betty Binns Fletcher, Melvin Brunetti, and
Ferdinand F. Fernandez, Circuit Judges

SUMMARY

Criminal Law and Procedure/Right to Counsel

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that in a capital murder prosecution, defense counsel's penalty-phase failure to present available mitigating evidence, combined with a superficial argument

against the death penalty, constitutes prejudicially ineffective legal assistance.

Appellant Bernard Smith was arrested by Arizona police following the robbery of a convenience store and fatal shooting of the clerk. Smith denied responsibility, asserting that "Al Johnson" had been the perpetrator and fled, leaving the loot and a gun in Smith's car.

A jury found Smith guilty of capital murder. During the presentencing hearing, defense counsel presented no mitigating evidence, although Smith had a sociopathic personality, a history of drug abuse and related personality change, and a great love for his children. In argument, Smith's attorney noted only that Smith was only 30 years old and continued to deny his guilt. The trial court sentenced Smith to death.

After exhausting his state post-conviction remedies, Smith sought federal habeas corpus relief. The district court denied his petition.

Smith appealed, contending that his trial attorney did not provide effective legal assistance, and that he was prejudiced by counsel's deficient performance.

[1] The mere failure to present evidence at sentencing does not result in a per se finding of ineffectiveness. But when no deficiency has been found, the failure to present evidence has been based on tactical considerations. When the grounds have not been based on tactical considerations, the Ninth Circuit has not hesitated to find deficient performance.

[2] In this case, counsel did not perform any real investigation into mitigating circumstances. No tactical reason was given. The record indicated that counsel asked nothing more than a few generalized questions, and conducted no real probing for information. There was no reason, tactical or otherwise, for the failure of counsel to develop any mitigation evidence. Counsel could

have pointed to Smith's sociopathic personality, bad drug history, his change in personality after a drug overdose, and his family relationships. Counsel could also have alluded Smith's love for his children. [3] There was no justification for counsel's failure to present evidence or argument on Smith's behalf. The failure to even attempt to persuade the sentencing judge that he should grant Smith leniency amounted to no representation at all. Counsel was not effective.

[4] Arizona's death penalty sentencing scheme requires a sentencing judge to order the death penalty if there are aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. It was particularly critical in this case that an attempt be made to present and argue mitigating circumstances. Counsel's failure was a virtual admission that the death penalty should be imposed.

[5] The Arizona Supreme Court has made it clear that an antisocial personality disorder is a mitigating factor. [6] Smith's long use of drugs was a factor that could have had a mitigating effect. A major personality change can amount to a mitigating factor in Arizona. An alternative picture of a convenience store robbery gone awry was a possible one to paint for the sentencing judge. With little effort, Smith's good family relationships could have been developed through evidence or argument. Smith was prejudiced by trial counsel's failure to present mitigating evidence or argument. [7] Confidence in the sentencing result was undermined. The writ had to issue.

COUNSEL

James M. Ackerman and David B. Earl, Jennings, Strouss & Salmon, Phoenix, Arizona, for the petitioner-appellant.

Galen H. Wilkes, Assistant Attorney General, Criminal Appeals Section, Office of the Attorney General, Phoenix, Arizona, for the respondent-appellee.

OPINION

FERNANDEZ, Circuit Judge:

Bernard Smith, a death-row prisoner of the State of Arizona, appeals the district court's grant of the state's motion for summary judgment, denial of his motion for summary judgment, and denial of his petition for a writ of habeas corpus. We affirm in part, reverse in part, and remand.

BACKGROUND

Unfortunately for the good citizens of Arizona, Smith went to Yuma in April of 1983, shortly after he was paroled from prison in California. Within a few months, he had committed three armed robberies of convenience stores. Then, on August 21, 1983, shortly before midnight, he entered the Low Cost Market in Yuma, pointed a gun at the store clerk, Charles Pray, and said, "Give me all of the money or I will blow your fucking head off." Pray, instead, called out his manager's name twice, whereupon Smith raised his gun and shot his hapless victim. Smith then cleaned out the cash register, ran from the store, encountered Ellen Foster and her sister in their car, and ordered them to go. He then jumped into his own car, but the sisters followed him for blocks and got his license plate number. The police stopped his car within a short time and discovered him, a revolver, and a roll of blood-stained bills.

Upon his arrest, Smith appeared to be in fine physical and mental condition. He offered up a cock-and-bull story about picking up a hitchhiker, who must have been the owner of the gun and the booty, at an intersection close to the store. That story fell apart when he discovered that Ellen Foster had followed his car from the store right through the intersection and had seen that he did not pick anyone up. Nothing daunted, Smith developed a new defense.

Now, it seems, the real story was that Al Johnson had come to

Yuma to talk to Smith about manufacturing PCP. After holding their business meeting, Smith and Johnson went to the Low Cost Market in Smith's car, after which Smith went in and exited peacefully. Johnson then went in and shot the clerk. After that, Johnson left his gun and the booty in Smith's car and left Smith.

Smith's victim suffered egregious wounds, but lingered on in pain and fear for a couple of weeks when he finally died from his injuries.

Smith's prosecution for this offense then commenced, he was found guilty by a jury, and was sentenced to death by the trial judge in accordance with Arizona's capital case procedures. He appealed, and in *State v. Smith*, 146 Ariz. 491, 707 P.2d 289 (1985) (*Smith I*), the Arizona Supreme Court affirmed both his conviction and his sentence. He then brought a series of post-conviction relief petitions in the state courts, and after the third of those was decided adversely to him, he proceeded with the present habeas corpus action in the federal courts. The district court, as we have said, denied the writ and he appealed.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 2254. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review grants of summary judgment de novo. *See Jessinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). We also review a district court's decision to grant or deny a § 2254 petition de novo. *See Moran v. McDaniel*, 80 F.3d 1261, 1268 (9th Cir. 1996). However, we accord a presumption of correctness to factual findings made by a state court and we accept state court rulings on state law questions. *See id.*

DISCUSSION

We have been presented with a long list of jeremiads about the state pretrial proceedings, the state trial proceedings, the state

sentencing proceedings, the state appellate proceedings, and, finally, the district court proceedings.

We have considered all of the claims, and find virtually all of them to be without merit. Thus, while it might seem to be out of the normal order of things, we will first turn to the only truly troubling aspect of this case; the aspect which requires habeas corpus relief. That is Smith's claim that he was denied effective assistance of counsel at his death penalty presentencing hearing.[1] We will only then turn to the other issues, and will dispose of them with less spilling of ink.

A. *Sentencing Proceedings*

It is undisputed that trial counsel presented no mitigating evidence at the presentencing hearing and, more than that, he essentially presented no argument on Smith's behalf. Counsel made a few asthenic comments to the effect that Smith still denied his guilt and that he was just 30 years of age. Nothing else!

We must decide whether counsel was ineffective based on the now familiar factors set forth by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In order to obtain relief, Smith must show both that counsel "was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment," and that the deficiency prejudiced him. *Id.* at 687, 104 S. Ct. at 2064.

The first factor requires the defendant to show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688, 104 S. Ct. at 2064. And in determining whether it did, we must be "highly deferential," avoid "the distorting effects of hindsight," and "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."

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1. We note that counsel in the proceeding before us were not counsel at Smith's trial.

Id. at 689, 104 S. Ct. at 2065.

The second factor requires that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S. Ct. at 2064. That in turn means that there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. And that in turn means that the unprofessional errors were egregious enough "to undermine confidence in the outcome." *Id.*; *see also United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995).

Of course, all of these rules apply to the death penalty phase of a prosecution. *Strickland* itself was a murder prosecution, and the Supreme Court did apply its rules to the death penalty part of the case. *See* 466 U.S. at 698-701, 104 S. Ct. at 2070-71; *see also, Clabourne*, 674 F.3d at 1378.

(1) *Representation*

[1] When we apply the first factor of the analysis to the case at hand, we are virtually compelled to determine that trial counsel was not effective. As we have said, counsel presented no evidence at the penalty phase and virtually no argument. We recognize that the mere failure to present evidence at sentencing, as troubling as that may be on its face, does not result in a per se finding of ineffectiveness. *See Darden v. Wainwright*, 477 U.S. 168, 185-87, 106 S. Ct. 2464, 2473-74, 91 L. Ed. 2d 144 (1986); *Mak v. Blodgett*, 970 F.2d 614, 618 & n.6 (9th Cir. 1992). But when no deficiency has been found, the failure to present evidence has been based upon tactical considerations. When the grounds have not been based upon tactical considerations, we have not hesitated to find deficient performance. *See Hendricks v. Calderon*, 70 F.3d 1032, 1043-44 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111, 116 S. Ct. 1335, 134 L. Ed. 2d 485 (1996) (decision to plead for mercy not based on strategy); *Clabourne*, 64 F.3d at 1387 (counsel's despair

not enough where the case was not a lost cause); *Evans v. Lewis*, 855 F.2d 631, 637 (9th Cir. 1988) (failure to investigate and to present any evidence of mitigation was not tactical).

[2] In the case at hand, counsel did not perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface. No tactical reason is given for that failure. At the post-conviction hearing, counsel did testify that he had spoken with Smith, and Smith's mother, but that he had received no information. Counsel also spoke generally with Smith about his growing up years, but did not discover any difficulties worth mentioning, and does not recall having been made aware of any treatment Smith might have received at a medical facility. We are well aware of the fact that counsel cannot be expected to have an afflatus through which he conjures up a wonderful story, without the help of his client. Indeed, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. And both strategic decisions and investigation may well depend on "information supplied by the defendant." *Id.* Nevertheless, the record before us indicates that counsel asked nothing more than a few generalized questions and conducted none of the real probing for information that legal praxis assumes and even demands. We simply cannot find any reason, tactical or otherwise, for the failure of counsel to develop any mitigation evidence at all for the purpose of defending Smith against the death penalty. We now know that counsel could have, at least, pointed to Smith's sociopathic personality, his bad drug history, his change in personality after a large drug overdose, and his fine set of family relationships at the time. Counsel could also have alluded to Smith's love for his children and his support of them.

[3] We do not say that any of the above considerations were so powerful that they must have led to a life sentence rather than to a sentence of death. But we can see no justification for counsel's failure to present evidence or argument on Smith's behalf. Even if no great amount of additional evidence were developed, counsel could have at least presented some argument based upon the

presentence report. That report reflected a personality problem, which to a somewhat trained eye looks sociopathic; prior drug use; good family relationships; and the existence of Smith's children. As we see it, the failure to even attempt to persuade the sentencing judge, through evidence or argument, that he should grant Smith leniency "'amount[ed] in every respect to no representation at all.'" *Clabourne*, 64 F.3d at 1387 (citaitons omitted). Thus, counsel was not effective, but was the result prejudicial? We think so, as we will explain.

(2) *Prejudice*

[4] Arizona's death penalty sentencing scheme requires a sentencing judge to order the death penalty, if there are any aggravating circumstances and "no mitigating circumstances sufficiently substantial to call for leniency." *See* Ariz. Rev. Stat. § 13-703 (E). Here, there could be no doubt that there were aggravating circumstances. Thus, it was particularly critical that an attempt be made to present and argue mitigating circumstances. *See Evans*, 855 F.2d at 637. To put it starkly, counsel's failure was a virtual admission that the death penalty should be imposed upon his client. Counsel could hardly have been deluded into thinking that he could deflect that inexorable result by merely stating that his client still denied guilt and was 30 years of age. The situation fairly bristles with prejudice, but we must proceed with some caution because Smith still bears the burden of showing that "confidence in the outcome has been undermined. *Strickland,* 466 U.S. at 694, 104 S. Ct. at 2068.

[5] In assessing prejudice in a case like this one, we are presented with a particularly difficult practical and jurisprudential question because we are not asked to imagine what the effect of certain testimony would have been upon us personally. We are asked to imagine what the effect might have been upon a sentencing judge, who was following the law, especially one who had heard the testimony at trial. Mitigating evidence might well have one effect on the sentencing judge, without having the same effect on a different judicial officer. For example, we now know that Smith has

a sociopathic personality. The Arizona Supreme Court has made it clear that an antisocial personality disorder (sociopathic disorder) is a mitigating factor, even if it does not come up to the level of a factor specifically listed in the Arizona sentencing statute. *See State v. Thornton*, 187 Ariz. 325, 334-35, 929 P.2d 676, 685-86 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1706, 137 L. Ed. 2d 831 (1997); *see also State v. Stokley*, 182 Ariz. 505, 521-22, 524, 898 P.2d 454, 470-71, 473 (1995), *cert. denied*, 516 U.S. 1078, 116 S. Ct. 787, 133 L. Ed. 2d 737 (1996). Thus, there can be no doubt that the trial court must consider that personality defect when it is present in a case. Yet, that factor has often been treated on appeal as insufficient to justify mitigation. *See, e.g., State v. Brewer*, 170 Ariz. 486, 505, 826 P.2d 783, 802 (1992). Thus, sociopathy might appear sufficiently mitigating to a sentencing judge in some circumstances, but not seem so to other judges in the same or different circumstances.

The sentencing judge must, after all, make the initial life or death decision, and his judgment will stand if it is supportable. Reviewing courts, at least on habeas corpus, conduct their review to see if the decision can be supported, rather than to see if they would have reached the same decision. When faced with a case like this one, where no evidence was offered and no argument was made on behalf of the defendant, the reviewing court's task is that much harder, but must still be discharged. Again, that is especially true where, as here, the failure to offer evidence or make argument amounts to a concession that the death penalty should be imposed, and an abandonment of the client to that fate. Our obligations and analyses are well illuminated by three of our cases, of which two are very recent.

In *Clabourne* counsel had developed some mental defect evidence at trial, but did not further develop the evidence at sentencing. He presented no evidence or relevant argument, even though there was some hope for his client. We found prejudice. *See* 64 F.3d at 1387. In *Correll v. Stewart*, No. 95-99012, slip. op. 1971 (9th Cir. March 9, 1998), we also faced a case where counsel essentially failed to present any mitigating evidence or, it seems, any

substantial argument. *See id.* at 1988. We found that both ineffective assistance and prejudice were sufficiently set forth to require an evidentiary hearing. *See id.* at 1989. Similarly instructive is *Gerlaugh v. Stewart*, 129 F.3d 1027 (9th Cir. 1977), where counsel did present mitigating evidence. *See id.* at 1033-36. However, the defendant alleged that counsel failed to present a forceful enough argument for leniency. *See id.* at 1036. We disagreed, but in so doing we carefully considered the claim that the failure to plead for his client's life was, in fact, ineffective assistance. *See id.* at 1036-43. We pointed out that counsel had argued for his client's life with great vigor, and that in light of Gerlaugh's "'shockingly evil and grossly bad'" conduct, "no plea for mercy or lenience . . . indeed no oral argument" could have saved him. *Id.* at 1042. Even at that, one judge on the panel dissented. *See id.* at 1045-52 (Reinhardt, J., dissenting). Again, the seriousness of our task when counsel has done nothing at all is manifest.

[6] We have applied ourselves to that task and must now conclude that Smith was prejudiced by trial counsel's failure to present mitigating evidence or argument on his client's behalf. We have already pointed out that Smith's sociopathic personality defect is a factor in mitigation, but the issue was neither developed by evidence nor argued to the sentencing judge. Similarly, Smith's long use of drugs is a factor that could have had a mitigating effect. *See, e.g., State v. Gallegos*, 178 Ariz. 1, 17, 870 P.2d 1097, 1113 (1994). As with a personality defect, it can be so, even if it does not rise to the level of a listed statutory mitigating factor. *See Stokley*, 182 Ariz. at 523, 898 P.2d at 472. We pause to mention that the issue regarding Smith's antisocial personality and his long-term use of drugs is not whether those precluded him from knowing right from wrong, as the post sentencing court and the district court seem to have assumed. They would have to come up to that level to meet a statutorily listed mitigating circumstance. *See* Ariz. Rev. Stat. § 13-703 (G) (1). They need not do so in order to be non-listed mitigators. Along the same line, a major personality change can amount to a mitigating factor in Arizona. *See State v. Rockwell*, 161 Ariz. 5, 15-16, 775 P.2d 1069, 1079-80 (1989). Smith has

presented some evidence that a change of that nature came over him after he had ingested a large amount of PCP in 1980. Counsel did not discover or follow up on that possibility. Of much less significance is Smith's argument that he did not really preplan the killing of his victim. Given the sentencing judge's comments upon the method of the killing in question, this factor seems weak indeed. The court stated that Smith was "fully prepared and intending to kill if his demands were not complied with instantly," and said that he had "coldly and deliberately murdered the victim . . . ." Still and all, an alternate picture of a typical armed convenience store robbery, which went awry when the victim yelled for his boss rather than handing over the money, was a possible one to paint for the sentencing judge under the facts of this case. *Cf. Harris v. Dugger*, 874 F.2d 756, 763-64 (11th Cir. 1989). Counsel's failure to even attempt to convince the sentencing judge of this alternate reality may itself have helped to foster the finding in question. Finally, Smith points to his good family relationships. That was before the sentencing judge through the presentence report, but in a very mild form. With a little effort it could have been developed through evidence or argument, and could have put Smith himself in a somewhat different light.

Again, we recognize that these factors, even as now developed, do not demand a life sentence rather than a sentence of death. On the other hand, while the facts of this case are bad enough to disturb even a jaded observer, they do not reach the level of those in cases where the aggravating facts were so overwhelmingly horrifying that it was highly improbable that mitigating factors of any ordinary stripe would help. *See, e.g., Gerlaugh*, 129 F.3d at 1042-43; *Bonin v. Calderon*, 59 F.3d 815, 836 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 718, 133 L. Ed. 2d 671 (1996); *Campbell v. Kincheloe*, 829 F.2d 1453, 1464 (9th Cir. 1987). We also recognize that a post-conviction court in Arizona has heard this evidence, and was not moved. Had the judge who heard the post-conviction proceeding also been the trial and sentencing judge, we would be considerably less inclined to order relief for that might at least approach a "looking-glass exercise in folly." *Gerlaugh*, 129 F.3d at 1036; *but cf. Clabourne*, 64 F.3d at 1387. As it turned out, it

was a different judge.

[7] In fine, after deep consideration and with all due respect to those who have heard this case before us, our confidence in the sentencing result has been undermined. The writ must issue.

B. *Other Sentencing Issues*

Even though Smith's purpose in killing his victim was to quickly get money from the cash register at the convenience store, Smith attacks the sentencing court's finding that he killed the victim for pecuniary gain. We find no merit in that argument. *See, e.g., State v. Gonzalez*, 181 Ariz. 502, 513, 892 P.2d 838, 849 (1995), *cert. denied*, ___ U.S. ___, 116 S. Ct. 720, 133 L. Ed. 2d 673 (1996); *State v. Ross*, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 210, 133 L. Ed. 2d 142 (1995). He also argues that the impact of the crime upon his victim was considered, but that impact went to the cruelty factor, which was stricken by the Arizona Supreme Court. *See Smith I*, 146 Ariz. at 504, 707 P.2d at 302. Thus, he can show no prejudice. His claim that considering the impact of the death on the victim's family violated his constitutional rights also fails. *See Payne v. Tennessee*, 501 U.S. 808, 828-30 & n.2, 111 S. Ct. 2597, 2610-11 & n.2, 115 L. Ed. 2d 720 (1991); *Gretzler v. Stewart*, 112 F.3d 992, 1009 (9th Cir. 1997) *cert. denied*, ___ U.S. ___, 118 S. Ct. 865, ___ L. Ed. 2d ___ (1998). At any rate, in Arizona the judge is the sentencer and can separate the wheat from the chaff. *See id.*; *State v. Spears*, 184 Ariz. 277, 292, 908 P.2d 1062, 1077 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 393, 136 L. Ed. 2d 308 (1996); *State v. Beaty*, 158 Ariz. 232, 244, 762 P.2d 519, 531 (1988). Nor does Smith's assertion that the Arizona Supreme Court could not reweigh the sentencing factors have a particle of merit. *See Jeffers v. Lewis*, 38 F.3d 411, 415-16 (9th Cir. 1994). Finally, entirely otiose is Smith's shotgun blast of claims that his sentence was unconstitutional because Arizona does not properly narrow the class of death penalty recipients; Arizona's proportionality review (or lack thereof) is improper; sentencing judges do not have proper

guidance; imposition of the death penalty under the statute is mandatory; the prosecutor can decide whether to seek the death penalty; the death penalty, in gross and as applied to Smith, constitutes cruel and unusual punishment; Smith was entitled to a jury trial on the sentencing issues; and the beyond a reasonable doubt standard was not applied. We reject them all.

C. *State Pretrial and Trial Issues*

(1) *General Assertions*

Smith asserts that his constitutional rights were violated when the trial court did not grant him a continuance to seek processing of a neutron activation test, which the prosecution had not pursued because the sample taking had been botched. The purpose of the test would have been to see if Smith had any powder residue on his hands, which would be an indication of whether he had fired a gun. However, he does not point to a portion of the record in which that motion was made, and the record does show that counsel did not even intend to pursue the test. As counsel explained, the test could have sunk Smith's defense that he did not commit he murder, and Smith himself did not want a continuance for that purpose. We are at a loss to see any error in this respect.

Smith also claims that he should have been given a continuance so that counsel could adequately prepare to counter evidence regarding other convenience store robberies that Smith had perpetrated, and regarding ammunition that had been seized from Smith's home. However, beyond the general amorphous statement that counsel was unable to prepare to defend, Smith does not show how he was unfairly prejudiced. We see nothing in the record to convince us that he was. *See Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S. Ct. 1710, 1722, 123 L. Ed. 2d 353 (1993); *Walton v. Arizona*, 497 U.S. 639, 656, 110 S. Ct. 3047, 3058, 111 L. Ed. 2d 511 (1990). In a somewhat similar vein, Smith asserts that his identification by witnesses of the other robberies and testimony about the similarity of the commands the robber gave should not have been admitted at all. But, of course, because Smith was making a

mistaken identification claim, the evidence was surely relevant and its admission was not a due process violation. If it were a state law evidentiary error, and we do not see that it was, that was not a basis for federal habeas corpus relief. "[I]t is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 480, 116 L. Ed.2d 385 (1991). That is what Smith wants us to do. We decline his invitation, and also decline his further invitation to reflect upon the relevance of the ammunition found at his house, except to say that it was relevant enough to avoid presenting any federal constitutional question.

Smith then argues that his *Brady*[2] rights were violated because counsel had not been informed that the police had heard about a rumor in the community to the effect that Smith's brother was in the car with him, but that Smith himself had gone into the store to commit the robbery. No doubt under *Brady* the state had the obligation to disclose favorable evidence to Smith. *See United States v. Bagley*, 473 U.S. 667, 674-75, 105 S. Ct. 3375, 3379, 87 L. Ed. 2d 481 (1985). However, it is pretty difficult to see how the information was favorable. If it were, it was so weak, so remote and so inconclusive that it is highly unlikely that it would have had any effect whatever upon the verdict, much less would it "undermine confidence in the outcome" of the trial. *Id.* at 682, 105 S. Ct. at 3383; *see also Carriger v. Stewart*, 132 F.3d 463, 479 (9th Cir. 1997) (en banc).[3]

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2. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

3. Smith would like to have argued still two more issues to us: that a photo of the victim should not have been admitted at trial, and that the prosecutor made an improper opening argument. However, the district court properly held that those claims were procedurally barred. *See Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305-06 (9th Cir.), *cert. denied*, ___ U.S. ___, 117 S. Ct. 588, 136 L. Ed. 2d 517 (1996). His further argument that the Antiterrorism and Effective Death Penalty Act changes this result is a wallydrag. Chapter 153 of the Act does not apply because Smith's case was commenced before its enactment. *See Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2068, 138 L. Ed. 2d 481 (1997); *Jeffries*

(2) *Ineffective Assistance of Counsel*

In another group of claims, Smith asserts that his trial counsel was ineffective because of a number of errors that he allegedly committed. We disagree, and will briefly say why. Smith first asserts that counsel was ineffective because he "allowed" the trials for Smith's armed robberies of other convenience stores to go to trial before this murder case. We think not. Had counsel rushed this case to trial with inadequate preparation, we would now be regaled with a claim that he was ineffective for that reason. Moreover, the other cases probably had priority because they were, actually, committed earlier and started sooner. And Smith does not show that his counsel could have manipulated the system so as to force this case to trial first. In fact, the post-conviction court was not convinced that he could have done so, and so held. On the other hand, we recognize that counsel did not give sufficient attention to the potential impact of the other robbery cases on this murder case. Those convictions were later used to impeach Smith and were used as two of the aggravating factors underlying his death sentence. At any rate, even if an element of ineffectiveness were shown (assuming that a single timing error in a well-presented trial would render counsel ineffective), Smith cannot show prejudice because he would still have been left with an aggravating circumstance — pecuniary gain. *See* Ariz. Rev. Stat. § 13-703 (F) (5).

Smith also argues that counsel failed to track down his will-o'-the-wisp witness, Al Johnson, a person whom Smith accused of committing the crime after Smith's first story fell apart. As the post-conviction court pointed out, the Al Johnson story was pretty suspicious, and, more than that, Smith did not give counsel much of a clue as to where Johnson could be found. More than that, trial counsel, as a matter of strategy, was much happier with having

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v. Wood, 114 F.3d 1484, 1494 (9th Cir.) (en banc), *cert. denied*, ___ U.S. ___, 118 S. Ct. 586, 139 L. Ed. 2d 423 (1997). Chapter 154 of the Act does not apply because Arizona does not meet its strictures. *See Lindh*, ___ U.S. at ___, 117 S. Ct. at 2063.

Johnson as an empty chair to which he could point, without facing the danger of refutation, etc. Smith, along the same lines, complains that his trial counsel was the first to mention that Johnson was in town to talk Smith into a drug deal, and that Smith had prior convictions for drug offenses. But that was both the heart of the Johnson story and a way of drawing the sting from any impeachment of Smith with those crimes when he testified. There are many ways to be effective, and we must resile from present counsel's attempt to lure us into the hindsight miasma that the Supreme Court has told us to avoid. *See Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065.

In another magnificent display of hindsight, present counsel asks us to fault trial counsel for failing to force an excited, upset, ill child to take the witness stand, when the purport of her exculpatory evidence was already before the jury. Trial counsel saw no real advantage in that; nor do we.

And, we are told that trial counsel should have had a neutron activation test performed, even though Smith did not want it, and even though it could have (in hindsight probably would have) sunk Smith's case. Instead, trial counsel carried on about the prosecution's failure to have the test performed. Of course, he knew that the reason for the failure was that the samples were collected improperly. Well, counsel can listen to his client and often should. *See Campbell*, 829 F.2d at 1463. And Smith still does not tell us what the results of the test would have been. *See United States v. Hamilton*, 792 F.2d 837, 839 (9th Cir. 1986). Those results may well have been just as devastating as counsel (and, perhaps, Smith) feared they would be.

As a closing shot, Smith attacks counsel's closing argument because, he says, counsel's description of reasonable doubt was not perfect. Perhaps it was not, but perfection is not required. Counsel did not tell the jury that it should not apply the reasonable doubt standard in judging his client. *Cf. United States v. Swanson*, 943 F.2d 1070, 1074-75 (9th Cir. 1991). In fact, Smith can only make his claim by mischaracterizing what his trial counsel said. Counsel

was not deficient and did not prejudice his client.[4]

CONCLUSION

We affirm the district court and turn aside Smith's attacks on his conviction and sentence in most respects. However, although he had leal [sic] counsel for his trial on the merits of the prosecution against him, he was denied effective assistance at sentencing when no mitigating evidence or argument was presented on his behalf. Given the facts of this case, the nature of Arizona's sentencing laws, and the extent of counsel's failure at sentencing, our confidence in the outcome of that proceeding has been undermined. Thus, we reverse the district court's denial of habeas corpus in that respect and remand with directions that it issue a writ releasing Smith from the sentence of death and directing that he be resentenced. Of course, we express no opinion on what the sentence should be.

AFFIRMED in part, REVERSED and REMANDED in part.

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4. Finally, Smith aims his attack on direct appeal counsel and on post-conviction counsel. He attacks the former because counsel did not file kitchen-sink briefs with the Arizona courts. But that is not necessary, and is not even particularly good appellate advocacy. *See Jones v. Barnes*, 463 U.S. 745, 750-54, 103 S. Ct. 3308, 3312-14, 77 L. Ed. 2d 987(1983); *Pollard v. White*, 119 F.3d 1430, 1435 (9th Cir. 1997); *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989). As to the latter, Smith has no right to counsel on post-conviction proceedings, much less effective counsel. *See Coleman v. Thompson*, 501 U.S. 722, 752, 111 S. Ct. 2546, 2566, 115 L. Ed. 2d 640 (1991); *Bonin v. Vasquez*, 999 F.2d 425, 430 (9th Cir. 1993)

APPENDIX B

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Clerk US District Court
District of Arizona
By _____ Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BERNARD SMITH Petitioner, vs. TERRY STEWART, et al.,[1] Respondents.	No. 87-634-PHX-RCB MEMORANDUM OF DECISION AND ORDER

Pending before the Court is Respondents' Motion for Summary Judgment requesting that the Court deny all relief sought by Petitioner in his Amended Petition for Writ of Habeas Corpus. Petitioner filed a Response and Cross-Motion for Summary Judgment, and both parties filed replies. For the reasons stated herein, the Court grants Respondents' Motion for Summary

1. Terry Stewart, Director of the Arizona Department of Corrections, and Meg Savage, Warden of the Arizona State Prison, Florence Complex, are substituted pursuant to F.R.C.P. 25(d) (1).

Judgment.[2]

. . . .

Claim 14: Petitioner Was Denied the Effective Assistance of Counsel at His Sentencing Hearing.

Petitioner claims that Clarke was ineffective for failing to present the following evidence as mitigation at the presentence hearing: 1) dysfunctional family; 2) deprived background; 3) history of drug addiction; 4) change in personality; 5) impaired judgment, 6) anti-social personality disorder; 7) no history of violence; 8) lack of pre-planned intent; 9) good family relationship. (File doc. 37 at 27-36.) The Arizona Superior Court held four days of evidentiary hearings on this claim and others raised in Petitioner's petitions for post-conviction relief. (R.T. 9/14/89; R.T. 12/7/89 Vol. 1-2; R.T. 12/8/89 Vol. 1-2; R.T. 1/30/90; M.E. 5/9/90.) For the reasons discussed below, this Court finds that Petitioner is not entitled to habeas relief on this claim.

Dysfunctional family and deprived background

Petitioner alleges that he grew up in a dysfunctional family and was abused by his stepfather. He also alleges that he had a deprived childhood, having grown up in neighborhoods where crime, gangs, unemployment, and drugs were prevalent. (File doc. 37 at 30-31.)

At a post-conviction hearing, Clarke testified that he spoke with Petitioner and his mother about presenting mitigation evidence at the presentence hearing. Petitioner did not indicate that he had any special problems growing up. Petitioner's mother related that the

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2. The Court does not decide whether the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 (to be codified at 28 U.S.C. § 2261) applies to this case. Even if it does, it would not enhance Petitioner's ability to obtain federal habeas corpus relief.

family was poor, but his childhood was relatively normal and uneventful. Clarke further testified that neither Petitioner nor his mother said that he had been abused by his stepfather. (R.T. 9/14/89 at 76, 87-88, 110-11.)

Petitioner's mother testified that the family moved to Los Angeles when Petitioner was about seven years old and lived in crime-ridden neighborhoods for a few years until they bought a home and moved to a good neighborhood. She stated that Petitioner started stealing and ditching school at about twelve years of age, spent a lot of time in juvenile correctional homes, associated with gang members in high school and got involved with drugs. Petitioner's stepfather was steadily employed and supported the family from the time Petitioner was seven years old. According to Petitioner's mother, he gave Petitioner whippings with his belt when Petitioner misbehaved, but did not otherwise abuse him. After about age twelve, Petitioner was not physically abused for misbehaving, but would have privileges taken away. She said Petitioner was treated the same as the other children. (R.T. 1/30/09 [sic] at 69-77, 87, 9-92, 98-100)[14]

The state court found:

> Petitioner's mother has now testified about his childhood and her testimony sharply conflicts with his concerning the allegations of abuse and dysfunctional family. Petitioner's own testimony suggests that he was not working at the time of the offense, but does not show poverty at the time of the incident, nor true poverty in youth.

(M.E. 5/9/90.) The court further stated: "[I]f all of the information

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14. Petitioner testified that his stepfather used to hit him with belts, cords, tree limbs, a board with carpet tacks, and his fists. Petitioner also stated that his stepfather treated him much more harshly than he did his own natural children (Petitioner's half brothers and sisters). (R.T. 12/7/89 at 9, 14-16.)

brought forth in the hearings here had been brought out at the mitigation hearing, a preponderance of the evidence would not show [deprived] childhood, parental abuse, mental infirmity or inability to understand the quality or nature of his acts or to act in conformity to the law." (Id.) After considering Petitioner's motion for rehearing, the state court again found "no dysfunctional family life." (M.E. 7/16/90.)

Having reviewed the presentence report in 1984, the sentencing court had been aware that Petitioner's natural father was murdered when Petitioner was two years old. The report also stated: "A satisfactory upbringing was reported [by defendant], with adequate income for the family's basic needs." (File doc. 87, Ex. M.) According to Clarke, he reviewed the presentence report with Petitioner and Petitioner did not indicate that it contained any errors. (R.T. 9/14/89 at 89.)[15]

Impaired judgment/ Drug addiction/ Change in personality

Petitioner contends that he has a history of drug addition (sic) which significantly impaired his ability to conform his conduct to the requirements of the law. He further alleges that on the day of the robbery he shared two cigarettes laced with PCP and thus would have been under its influence at the time of the robbery. (File doc. 37 at 31-32; R.T. 12/7/89 at 36-37.)

At a post-conviction hearing, Petitioner testified that prior to trial he told Clarke he had used PCP on the day of the robbery. (R.T. 12/7/89 at 43.) However, Clarke testified that Petitioner said he had not taken any PCP that day, had not used PCP for a long time, and when he did he was not a heavy user. (R.T. 9/14/89 at 86-87.) In addition, an analysis of a urine sample taken twenty hours after the robbery did not show the presence of PCP. (Id.

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15. Petitioner testified that Clarke did not discuss possible mitigating circumstances or review the presentence report with him. (R.T. 12/7/89 at 44-45.)

at 92-93; file doc. 46, Ex. 0.) The toxicologist testified that if Petitioner had smoked two PCP cigarettes the day before, he would have expected to find the presence of PCT. (R.T. 12/8/89 at 191-96, 201-8.)[16]

Petitioner's expert, Dr. John Simonis, testified that Petitioner was a chronic abuser of PCP and that studies suggested such long-term use tends to impair judgment and cause behavioral changes such as lower frustration tolerance and increased anger. He further testified that whether an individual under the influence of PCP has a reduced ability to distinguish right from wrong depended on how much PCP was ingested and how it was taken. Dr. Simonis agreed that a person who had taken a "moderate or heavy dose" of PCP would exhibit certain outward symptoms and he basically admitted that Petitioner's actions on the night of the robbery did not indicate he had smoked two strong PCP cigarettes. (R.T. 12/7/89, 1:47 p.m., at 23-42.) However, Dr. Simonis also stated that due to his chronic abuse of PCP, Petitioner would have developed "a very significant tolerance" to PCP which may have masked some of the overt symptoms. (Id. at 59-62.)

In the opinion of the state's expert, Dr. Otto Bendheim, on the night of the robbery Petitioner was able to distinguish right from wrong and to assess properly the nature and quality of his acts, and "was not under any obvious influence of toxic substances, including PCP." He acknowledged that when a person is "coming down" he is still under the influence but might not show overt symptoms. (R.T. 12/8/89 at 106-15, 122, 144-45.) Dr. Bendheim agreed that Petitioner had a history of chronic PCP abuse and that long-term use

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16. Petitioner testified that he shared two cigarettes that day, one in the afternoon and one in the evening. He said it was "good stuff" which had a "strong effect," but when he was arrested he was not feeling a full strength effect because he was "coming down." (R.T. 12/7/89 at 36, 62-63, 68-69.) Petitioner's expert testified that the description "good stuff" implied a strong dose. (R.T. 12/7/89, 1:47 p.m., at 32.) All the experts agreed that PCP is stored by the body's organs and released slowly over hours, days and even weeks. (R.T. 12/7/89, 1:47 p.m., at 34; R.T. 12/8/89 at 119, 191-96.)

can impair memory, concentration, and orientation and possibly cause paranoia. However, he did not find that Petitioner's abilities were impaired. (Id. at 101, 124, 137.) Dr. Bendheim did not believe that Petitioner could have developed a significant tolerance to PCP in the three months he had been out of prison prior to the robbery. (Id. at 151.)

Petitioner also argues that his change in personality should have been presented as mitigating evidence. He was hospitalized in 1980 after drinking liquid PCP. At the post-conviction hearing, his mother testified that after that incident Petitioner's personality changed and he became hostile and "angry at the world." (R.T. 1/30/90 at 78-82.)

The state court made the following findings of fact:

> That no person who came in contact with the Petitioner, Bernard Smith, on the evening of his arrest had difficulty understanding him, nor was there evidence that the Petitioner, Bernard Smith, had difficulty understanding any of the officers or obeying their commands.
>
> That the Petitioner, Bernard Smith, was not under the influence of drugs or alcohol on the night he was arrested.

(M.E. 5/9/90.) It further found:

> While there is evidence from the Petitioner of his extensive use of drugs, there is no evidence that he was either (a) under the influence of drugs, or (b) that his use of drugs affected his ability to distinguish right from wrong, or (c) that his use of drugs diminished his ability to conform his conduct as required by law, at any relevant moment. In fact, the evidence would have supported a finding beyond a reasonable doubt that the Petitioner was neither affect[ed] by nor under the influence of drugs at the time the offense was committed. This man had no other physical or mental impairment at the time the offense was committed.

(M.E. 5/9/90.)

The presentence report reviewed by the sentencing court in 1984 stated: "Substance usage includes alcohol, marijuana, PCP, and cocaine. Defendant reports none of the drugs has been an abuse problem for him, though he does acknowledge frequent recreational use." (File doc. 87, Ex. M.)

Anti-social personality disorder

Petitioner alleges that he has an anti-social personality disorder which impaired his ability to conform his behavior to the requirements of the law. (File doc. 37 at 32-33.)

At the post-conviction hearing, Dr. Simonis and Dr. Bendheim agreed that Petitioner had an anti-social personality disorder. Both stated that a person with such a disorder is able to distinguish right from wrong but often wilfully decides to do wrong out of self-interest. (R.T. 12/7/89, 1:47 p.m., at 16-17, 21-22, 51-52; R.T. 12/8/89 at 105, 125, 131, 154.)[17]

As noted above, the state court found that Petitioner was not acting under the influence of drugs and "had no other physical or mental impairment at the time the offense was committed." (M.E. 5/9/90.) Upon denying the motion for rehearing, the state court found that "[n]o anti-social personality would make it difficult for the defendant to know right from wrong." (M.E. 7/16/90.)

No history of violence

Petitioner asserts that he "has a history of drug offenses and theft, but this [Low Cost Market robbery] is the only event in which

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17. Under Arizona law, a person could be found legally insane at the time of the offense if he was impaired by a "mental disease or defect." A.R.S. § 13-502 (1983). "Mental disease or defect" did not (and does not) include anti-social personality disorder. State v. Salazar, 146 Ariz. 540, 542, 707 P.2d 944, 946 (1985).

he is alleged to have been involved in actual violence." (File doc. 37 at 33-34.)

The presentence report reveals that Petitioner was convicted of the following crimes as an adult in California: assault with a deadly weapon, receiving stolen property, possession of drugs (multiple), grand theft property, possession of firearm by a felon. In his statement for the report, Petitioner said that he always carried a gun when he was dealing drugs because he needed it for protection. (File doc. 87, Ex. M.) In Arizona, Petitioner was convicted of three counts of armed robbery. In at least one of the robberies, Petitioner threatened to blow the clerk's head off. (R.T. 1/13/84 at 818.)

Lack of pre-planned intent

Petitioner alleges that the evidence at trial indicated that "the robber" had no intention of shooting anyone when he entered the store and that he became nervous and acted out of panic when he shot the victim. (File doc. 37 at 34-35.) However, at sentencing, the trial court found: "The entire episode showed no evidence of any panic-stricken, inexperienced, immature youth, but rather the acts of a mature, sophisticated, deliberate, experienced criminal who entered into the transaction fully prepared and intending to kill if his demands were not complied with instantly." (R.T. 2/17/84 at 1148.)

Good family relationship

Regarding Petitioner's argument that his counsel should have presented evidence that Petitioner's family loves him, the post-conviction court found:

> Counsel did talk with the Petitioner's mother prior to sentencing. He was of the opinion that placing her on the witness stand would show that: (a) Petitioner's childhood was not one of abuse or of family problems, but one which was normal; (b) that Petitioner had not spent a lot of time with the family over the several years prior to the crime; (c) that Petitioner had mentioned to his mother that he

might rob someone; (d) or that his life was greatly changed by use of drugs, and that none of these things was beneficial to the Petitioner.

(M.E. 5/9/90.)

From having reviewed the presentence report in 1984, the sentencing court had been informed that Petitioner's family remained in frequent contact with him throughout his incarcerations, that one reason Petitioner came to Yuma was to visit his ill mother, and that he has never been married but has two children from a previous relationship. The report also stated: "Defendant reports good family relations still exist today." (File doc. 87, Ex. M.)

Conclusion

In order to prevail on this claim, Petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984). Regarding prejudice, Petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. When a petitioner challenges a death sentence, the question is whether there is a reasonable probability that, absent the alleged errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. at 695, 104 S. Ct. at 2069. In the present case, the Court need not decide whether Petitioner's trial counsel made a sufficient effort to investigate and present mitigation evidence, because Petitioner was not prejudiced by the alleged errors and omissions.[18] See e.g. Woratzeck v.

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18. Clarke testified that he did discuss with Petitioner and his family members potential mitigating circumstances, but at that time no one mentioned the circumstances now raised by post-conviction counsel. Clarke also stated: "[O]n the occasions that I talked to him [Petitioner] about it he had no information to give me." (R.T. 9/14/89 at 75-76.) When Clarke asked him for names of people to call as character witnesses, Petitioner offered no names. (Id. at 88-89.)

Stewart, 1996 WL 537224 (9th Cir. Sept. 24, 1996).

As noted above, after the post-conviction hearings, the state court found that Petitioner did not have a dysfunctional family or deprived background. A state court's factual findings (including credibility of witnesses) are presumed correct if fairly supported by the record. Marshall v. Lonberger, 459 U.S. 422, 432, 103 S.Ct. 843 (1983). The state court's findings are fairly supported by the record. The court clearly believed the testimony of Petitioner's mother about his childhood. If counsel had had Petitioner's mother testify at the presentence hearing, it would not have helped him establish mitigation. Her testimony at the post-conviction hearing tended to show that Petitioner turned to a life of crime and drugs despite a supportive family, good home, and strict father figure. In addition, she testified that when Petitioner was living with the family in Yuma he said several times "I can't find no job so I might as well rob somebody." (R.T. 1/30/90 at 100, 102-3.) Furthermore, Dr. Bendheim found nothing in Petitioner's background which would impair his ability to control his actions and conform his contact to the requirements of the law. (R.T. 12/8/89 at 124.)

The state court found that on the night of the robbery Petitioner was not under the influence of drugs. It also found that his past drug abuse had not impaired his judgment or ability to control his actions. These findings are fairly supported by the record, in particular by Dr. Bendheim's testimony, the toxicologist's testimony, and the negative lab report. (See also R.T. 1/30/90 at 22-36 (additional expert testimony); R.T. 9/14/89 at 125-35, 146-52; R.T. 12/8/89 at 67-77 (police officers' testimony); R.T. 12/7/89 at 52-63, 69, 74 (Petitioner's testimony).)

The doctors' testimony at the post-conviction hearings established that Petitioner has an anti-social personality disorder. However, both doctors also testified that a person with such a disorder is able to distinguish right from wrong but often wilfully decides to do wrong out of self-interest. Such evidence has very little or no mitigation value. In addition, the state court found that Petitioner had no "mental impairment" at the time of the offense.

Petitioner's allegation that he has no history of violent behavior is not supported by the facts. The presentence report states that Petitioner was convicted of assault with a deadly weapon in California. Petitioner was convicted of three counts of armed robbery (Circle K robberies) in Arizona.

At sentencing, the trial court found that Petitioner shot the victim not because Petitioner panicked, but because the victim did not comply with his demand to hand over the money. The court found that Petitioner committed the robbery fully intending to shoot the clerk if his demands were not met. These findings are fairly supported by the record. (See discussion supra at 30-31.)

The evidence that Petitioner has a good relationship with his family was not contested at the post-conviction hearings. However, that information was in the presentence report which the sentencing court considered for mitigation purposes. In addition, as noted above, having Petitioner's mother testify at the presentence hearing would not have been particularly beneficial. Petitioner also asserts that his counsel should have presented evidence that he was a "positive influence" on his two children in California. However, Petitioner's evidence in this regard was very weak. Although he testified that he often provided money for his children, he was making the money dealing drugs. He was also taking drugs, unemployed, and frequently in prison. (R.T. 12/7/89 at 33-34, 64-71; R.T. 12/7/89, 1:45 p.m., at 70-72.) He violated parole and left California in part because he had "nothing going for him" there. (File doc. 87, Ex. M.)

For these reasons, the Court finds that even if trial counsel had presented the evidence and arguments which Petitioner claims he should have, there is not a reasonable probability that Petitioner would have received a life sentence. Claim 14 is denied.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YUMA

STATE OF ARIZONA,	)	No. 11801/11817
	)	
Plaintiff,	)	ORDER RE: THIRD
	)	PETITION FOR
	)	POST-CONVICTION
vs.	)	RELIEF
	)	
BERNARD SMITH,	)	
	)	
Defendant.	)	
	)	

This is the Third Petition for Post Conviction Relief and was filed February 1, 1989. In addition to the relief he requests here, petitioner seeks a rehearing on the First and Second Petitions for Post Conviction Relief.

. . .

XII. POTENTIAL MITIGATING CIRCUMSTANCES

Petitioner now claims that the trial judge should have considered the following as mitigating circumstances:

1. The facts and circumstances of the shooting.
2. The victim's failure to follow orders and give Petitioner the money.
3. The nervousness of the Petitioner when he fired the weapon.
4. Petitioner's extensive use of drugs.
5. Whether the Petitioner could be rehabilitated and become a productive member of society.
6. Petitioner's troubled childhood.

7. Petitioner's poverty.
8. Petitioner's lack of education.
9. Proportionality of the death sentence in this case.
10. The possibility that the killing may have been accidental.
11. The cumulative effect of the above.

The record reflects that the trial judge did consider the circumstances surrounding the shooting.

While there is evidence from the Petitioner of his extensive use of drugs, there is no evidence that he was either (a) under the influence of drugs, or (b) that his use of drugs affected his ability to distinguish right from wrong, or (c) that his use of drugs diminished his ability to conform his conduct as required by law, at any relevant moment. In fact, the evidence would have supported a finding beyond a reasonable doubt that the Petitioner was neither affect [sic] by nor under the influence of drugs at the time the offense was committed. This man had no other physical or mental impairment at the time the offense was committed.

The Petitioner's troubled childhood, lack of formal education and poverty may not have been considered by the trial judge because the record shows clearly that these were not presented to him. Petitioner's mother has now testified about his childhood and her testimony sharply conflicts with his concerning the allegations of abuse and dysfunctional family. Petitioner's own testimony suggests that he was not working at the time of the offense, but does not show poverty at the time of the incident, nor true poverty in youth.

While the trial judge may, or may not have made a proportionality review, such has been done by the Supreme Court and decided adversely to the Petitioner.

Neither the record, nor the verdict of the jury has within it any suggestion that the shooting was other than the intended act of a person who could and did make a reasoned decision to pull the trigger.

XIII. EFFECTIVE ASSISTANCE OF COUNSEL - SENTENCING:

The only matter presented here which was not brought out above is that his family loved the Petitioner. Counsel did talk with the Petitioner's mother prior to sentencing. He was of the opinion that placing her on the witness stand would show that; (a) Petitioner's childhood was not one of abuse or of family problems, but one which was normal; (b) that Petitioner had not spent a lot of time with the family over the several years prior to the crime; (c) that Petitioner had mentioned to his mother that he might rob someone; (d) or that his life was greatly changed by use of drugs, and that none of these things was beneficial to the Petitioner.

Certainly Petitioner's mother loves him. This is a situation that is inherent. However, if all of the information brought forth in the hearings here had been brought out at the mitigation hearing, a preponderance of the evidence would not show childhood, parental abuse; mental infirmity or inability to understand the quality or nature of his acts or to act in conformity to the law.

Since even the things presented show clearly that the Petitioner could, and did, recognize what he was doing and that such was wrong but chose not to follow the course of action which he knew was proper, they would not have been different at sentencing, and this was obvious to counsel.

. . . .

ORDERED:

1. That the applications for payment of experts may be granted subject to the provisions set out above.

2. That the application of counsel for Petitioner to be appointed at county expense is overruled.

3. That there being no colorable claim which would entitle the petitioner to relief, the Third Petition for Post Conviction Relief is

dismissed.

Dated this 9th day of May, 1990.

s/H. S. Bradshaw

Judge of Superior Court

11801-12.p

APPENDIX D

IN THE SUPERIOR COURT
11801/11817

Case No.

RUTH A. EVANS,
CLERK OF PIMA COUNTY,
STATE OF ARIZONA

Patricia Brockert
Court Reporter

III
Div.

July 16, 1990
Date

Hon. H. Stewart Bradshaw
Judge of Superior Court

STATE OF ARIZONA)
vs)
)
BERNARD SMITH)

MOTION FOR REHEARING
1:30 P.M.

This matter comes on before the court, Galan [sic] Wilkes, assistant attorney general, is present for the state and the defendnt [sic] is represented by Michael O'Connor and Stephen Myers. The court reporter, Patricia Brockert, is present.

A statement is made by the defendant urging the motion for re-hearing. The defendant feels that his counsel, Robert Clarke, did not meet the standard of care for the defendant and that the Circle K trials should not have been tried first. The state makes a statement as to the fact that the Circle K robberies took place first so that trial should have been first. The murder trial could not have been tried in the 47 days. The mitigating factors of the defendant whould [sic] not have affected his mental ability even if he had a dysfunctional family life. The Brady information would not have made any difference to the defendant's defense The state opposes the motion and moves that the court deny the motion for re hearing. The defendant further urges the motion stating that the Circle K convictions would not have existed if the murder trial had been held first and that Mr. Clarke did not do his client's sentencing very well.

The court is not convinced if by the preponderance of evidence that the state did not have the ability to try this case after the Circle K trials.

IT IS ORDERED The court finds there was no dysfunctional family life, no evidence to persuade the court that the defendant was on drugs at the time the crime was committed or that drugs impaired his judgment. No anti social personality would make it difficult for the defendant to know right from wrong. The court finds that there is no basis to overturn that which has been ordered. The motion may be over ruled.

Copies to: Galan [sic] Wilkes, Asst AG Office 1275 W. Washington, Phx, AZ 85007 Michael O'Connor / Stephen Myers 1 Renaissance Sq. 2 N. Central Ave, Phx, Az. 85004-2393

APPENDIX E

February 10, 1984
9:00 a.m.

MITIGATION HEARING

APPEARANCES: TIM HOLTZEN, Yuma Deputy County Attorney, For the State

ROBERT C. CLARKE, Attorney at Law, For the Defendant

THE COURT: Number 11801 and number 11817, State of Arizona against Bernard Smith. Case number 11801, that being the matter wherein the defendant was convicted of the offense of robbery, comes before the Court at this time for the presentence hearing. Case number 11817, being the case wherein the defendant was convicted of the offense of murder in the first degree comes before the Court at this time pursuant to A.R.S. 23-703 proving for the hearing at this time for determination as to what sentence shall be imposed by the Court at the time of sentencing.

Is the State ready to proceed?

MR. HOLTZEN: Yes, Your Honor, the State is ready.

THE COURT: Mr. Clarke, are you prepared to proceed?

MR. CLARKE: Yes, Your Honor.

THE COURT: Mr. Holtzen?

MR. HOLTZEN: Your Honor, I would like to call as a witness Irene Lett.

IRENE LETT

having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOLTZEN:

Q. Irene, would you state your name, please?

A. Irene Lett.

Q. Where are you employed?

A. At the county clerk's office here in the courthouse.

Q. What is your occupation?

A. I am a deputy clerk.

Q. Are you assigned any particular courtroom?

A. Yes, I am assigned to Division Two.

Q. Who is the judge in that courtroom?

A. B.L. Helm.

Q. Do you in the course of your occupation attend criminal trials?

A. Yes, sir.

Q. Do you maintain and control files concerning those criminal cases?

A. Yes.

Q. Have you prepared some documents at my request?

A. Yes, I have.

Q. Let me ask you, in the month of December, did you attend a trial concerning a Bernard Smith?

A. Yes, I did.

Q. And were you also attending the sentencing in that case?

A. Yes, sir.

Q. I am referring to case number 11802, State of Arizona versus Bernard Smith. I ask you to look at what is marked Exhibit No. 1 and tell me if that is a document that you prepared for me?

A. Yes, it is.

Q. And have you certified it?

A. Yes.

Q. Have you compared that document to the one in the file, and is it in fact a true and accurate copy of the indictment contained in file number 11802?

A. Yes.

MR. HOLTZEN: Move for the admission of Exhibit No. 1.

MR. CLARKE: May I ask just a question or two on voir dire?

THE COURT: You may.

VOIR DIRE EXAMINATION

BY MR. CLARKE:

Q. Irene, I notice that there are some lines marked out here on the indictment. Who made those marks?

A. I believe the judge did.

Q. You are not certain who made those marks?

A. I am not.

Q. Have you compared those marks, is this a copy of the original indictment in the file, Irene?

A. Yes, it is.

Q. And have you compared this document with the original document to make certain that the lines that are lined out here and the copy are the same lines that are lined out on the original of the document?

A. Yes, sir.

MR. CLARKE: I have no objection.

THE COURT: State's Exhibit One may be received.

DIRECT EXAMINATION CONTINUED
BY MR. HOLTZEN:

Q. Irene, were you present when the jury returned the verdict in that case on the trial for three counts of armed robbery?

A. Yes, I was.

Q. And at the time that the verdicts were returned, did you actually possess those verdicts?

A. Yes, sir.

Q. I would like to show you what is marked Exhibit No. 2, Exhibit No. 3 and Exhibit No. 4 and ask you if those are documents that you prepared?

A. Yes, they are.

Q. And did you certify those documents as clerk of the court?

A. Yes, sir.

Q. Did you compare those to the originals from the file of case number 11802?

A. Yes, I did.

Q. And are they a true and accurate copy of that which is in the file?

A. Yes, sir.

MR. HOLTZEN: Move for the admission of Exhibits Two, Three and Four.

MR. CLARKE: No objection, Your Honor.

THE COURT: State's Two, Three and Four may be received.

BY MR. HOLTZEN:

Q. Irene, I would like to show you now what is marked Exhibit No. 5 and ask you if that is a document that you have prepared?

A. Yes, it is.

Q. And just for the record, I believe that is labeled the judgment and conviction?

A. Right.

Q. Judgment of conviction. Did you certify that document?

A. Yes, I did.

Q. And did you compare that document to the original in the court file on case number 11802?

A. Yes, sir.

Q. And is it a true and accurate copy of the document of judgment of conviction contained in the file?

A. Yes, it is.

MR. HOLTZEN: Move for the admission of Exhibit No. 5.

MR. CLARKE: No objection, Your Honor.

THE COURT: State's Five may be received.

BY MR. HOLTZEN:

Q. Irene, from your location in the courtroom during the trial and during the sentencing, were you able to observe the defendant in that case?

A. Yes, I was.

Q. Could you see that person?

A. Could I see him? Yes, I could.

Q. At that time during the trial and during the sentencing?

A. Yes.

Q. And do you see that person in the courtroom today?

A. Yes, I do.

Q. For the record, would you indicate where that person is today?

A. He is sitting at the defense table next to Mr. Clarke.

MR. HOLTZEN: Your Honor, I would ask that the record reflect she has identified the defendant in this case.

THE COURT: Yes, the record may so show.

MR. HOLTZEN: I have no further questions.

MR. CLARKE: I have no questions of the witness, Your Honor.

MR. HOLTZEN: Your Honor, I have no further witnesses; however, I do of course pursuant to A.R.S. 13-703 rely on evidence presented at the trial which not only shows of course the same issue I have confronted here to a certain degree, the identity of the defendant in the prior convictions, but also the evidence presented as to the specifics on two of the prior convictions, that is, Robert Allen Jones, I am sorry, Mr. Jones' and Mr. Irwin's armed robberies I get mixed up, but the Court is familiar with the facts as presented in court here.

I gave a notice of the aggravating circumstances, that being the three actual offenses of which Mr. Smith has been convicted which are punishable by life imprisonment, and three offenses for which he has been convicted that are felonies involving a threat of violence on another person, and the evidence presented at trial to show the aggravating circumstance that this was a crime committed for financial gain or pecuniary gain.

There are a number of matters that came before the Court in the trial that I did not wish to reiterate at any great length today, but I ask the Court of course to take notice of those aspects of the trial in addition to the evidence presented today.

THE COURT: Has the State made a recommendation as to the sentence that they feel should be imposed in the case, Mr. Holtzen?

MR. HOLTZEN: Yes, Your Honor, on behalf of the State I recommend that the death penalty be imposed in this matter, that the law calls for it in any circumstance where there is in fact even one aggravating circumstance, I believe the standard set forth in the statute says unless there are mitigating circumstances substantial enough to call for leniency. That would be true if there was even just one aggravating circumstance, and I submit to the Court that there are seven to be considered here, three in each category of number one and number two in my notice of aggravating circumstances, and of course number three, the financial gain makes the seventh aggravating factor.

THE COURT: The State has no mitigating circumstances that they know of to present, Mr. Holtzen?

MR. HOLTZEN: No, Your Honor.

THE COURT: Mr. Clarke, do you have any testimony or evidence you wish to present?

MR. CLARKE: No, Your Honor. I have no evidence or testimony to present. I would like to be heard very briefly.

THE COURT: You may.

MR. CLARKE: Your Honor, with respect to the factors listed in A.R.S. 13--703 with respect to the mitigating circumstances, I would point out to His Honor the relative age, relatively young age of the defendant, Your Honor, as called for for mitigating circumstance by the statute. The defendant has recently turned 30 years of age.

With respect to the offenses, Your Honor, that Mr. Smith has recently been convicted of, to-wit: The three armed robberies that

Mr. Holtzen has just presented evidence of as being six aggravating circumstances as call for in Subsections One and Two, I would point out to His Honor that the defendant has appealed those convictions, and although it is not called for as a specific mitigating circumstance pursuant to A.R.S. 13-703, Your Honor, I believe that the fact that the defendant has maintained his innocence in connection with those offenses and has appealed those convictions, that those matters should not be considered at the present time as an aggravating circumstance.

Finally, Your Honor, with respect to the offense for which defendant stands convicted before this Court, I would once again, Your Honor, point out that the defendant, since his arrest, has maintained his innocence, that at the trial of this action he testified that he in fact did not commit this offense but rather a person by thename of Al Johnson committed this offense, that the testimony as presented by the defendant was consistent with the physical evidence as presented during the course of this trial, Your Honor. Of course, the jury did not believe his story and found him guilty. However, I would suggest to His Honor that the testimony of the defendant, his claim of innocence throughout the course of the proceedings and the fact that his testimony is consistent with the physical evidence should be treated by the Court as a mitigating circumstance.

That's all I have, Your Honor.

THE COURT: Mr. Clarke, were you furnished with a presentence report as provided?

MR. CLARKE: Yes, I was, Your Honor.

THE COURT: Did you have an opportunity to go over it with the defendant?

MR. CLARKE: Your Honor, it is quite lengthy and I have not had an ample opportunity to go over the entire presentence report with the defendant, no, sir.

THE COURT: Is there anything in there that you feel that you want to present or take any exception to?

MR. CLARKE: No, Your Honor, although I would like an opportunity to fully review it with the defendant and prior to sentencing, if there is anything to present, present it at that time.

THE COURT: Well, you realize, Mr. Clarke, of course that it is necessary for the Court to prepare a special verdict in the case before the time of the imposition of sentence. I hesitate to do that if you feel that there may be something in the presentence report that you wish to bring to the attention of the Court as being in error.

MR. CLARKE: Your Honor, I don't believe that there is anything in the presentence report that I would submit to the Court as being in error. For the purpose of preparing a special verdict, I will review the presentence report with the defendant this morning, and should there be anything, I would request then another hearing to be scheduled for the Court's next criminal date in order for you to have an opportunity to prepare the special verdict in advance of the sentencing date.

THE COURT: Would you advise the Court of that then sometime today, Mr. Clarke, as to whether you wish further hearing on it?

MR. CLARKE: Yes, I will, Your Honor.

THE COURT: I will point out, Mr. Clarke, that there has been nothing that has been presented to the Court outside of the presentence report and the matters that have been introduced in court today that the Court will take into consideration in any way in the imposition of sentence in this case.

Is there anything further you wish to be heard on at this time?

MR. CLARKE: Nothing further.

THE COURT: Mr. Holtzen?

MR. HOLTZEN: Your Honor, I don't want to misinterpret what you have said. The Court can of course consider what was presented at trial; is that not correct?

THE COURT: Absolutely, yes.

MR. HOLTZEN: There is one other matter I might point out to the Court. There are two 1983 cases that require the Court to make a special verdict, I guess would be the phrase, at least a specific finding in a felony murder case that before any penalty of death be imposed, the Court must find beyond a reasonable doubt that the person who was charged with the felony murder either killed, intended to kill or attempted to kill the individual. This comes from the Florida case where the getaway driver was sentenced to death and the Court said, the United States Supreme Court said that person could not be sentenced to death unless there was a specific finding that he killed, attempted to kill or intended to kill. So the two Arizona cases have upheld that, being State v. McDaniel and State v. Gillies, so I would ask the Court also make a finding as to that before sentence on next Friday, I believe.

THE COURT: Yes, I think that is a part of it, Mr. Holtzen, but in this case I rather doubt that the question arises because of the lack of any other party that was charged with the offense.

Mr. Smith, do you wish to make any statement at this time on your own behalf?

THE DEFENDANT: No.

THE COURT: You will also be given a further opportunity prior to the imposition of any sentence to make a statement if you wish to do so.

Very well. The matter will be continued then until the time heretofore set for the imposition of sentence, on Friday,

February 17, at 9:00 o'clock, unless, Mr. Clarke, you request a further hearing because of the presentence report.

MR. CLARKE: Thank you, Your Honor.

APPENDIX F

February 17, 1984
9:00 a.m.

SENTENCING

APPEARANCES: TIM HOLTZEN, Yuma Deputy County Attorney, For the State
ROBERT C. CLARKE, Attorney at Law, For the Defendant

THE COURT: Number 11801, State of Arizona against Bernard Smith.

Mr. Smith, I have to advise you again that an indictment was returned in this court charging you with the commission of the offense of armed robbery, which was a class two felony. You were duly arraigned upon that charge and entered a plea of not guilty. Thereafter, the matter went to trial, and on the 19th day of January of this year, the jury returned its verdict wherein they found you guilty of the offense of armed robbery.

Based upon that verdict, it is now the judgment of this Court that you, Bernard Smith, are guilty of the offense of armed robbery, a class two felony, and that such offense was committed while you were on parole upon a felony conviction from the State of California.

Do you have any legal cause to show why sentence should not now be pronounced, Mr. Clarke?

MR. CLARKE: No, Your Honor.

THE COURT: Very well, It is now the sentence of the Court that in compliance with Arizona Revised Statute 13-604.01, Subsection A, the crime being a class two felony involving the use of a deadly weapon, and involving the intentional and knowing infliction of serious physical injury on another while the defendant

was on parole for the conviction of a felony offense, it is the sentence of this Court that you are hereby sentenced to life imprisonment in the Arizona State Prison in charge of the Department of Corrections. That sentence is to be served consecutively to the sentence imposed upon you and for which you are on parole from the State of California, and will commence upon the expiration of the California sentence.

You shall be allowed the credit of 180 days upon that sentence, that being the time that you have been incarcerated to date upon this charge.

I have to advise you now that you have the right to appeal from the judgment and sentence in this case, that any appeal you may take must be filed within 20 days from today. You will be given a copy of your notice of right to appeal and appeal procedure. Mr. Clarke will go over it with you. When you understand it, sign it in order that it may be placed in the file. You may have a copy for yourself if you wish to have one.

Number 11817, State of Arizona against Bernard Smith.

Mr. Smith, in this case I have to advise you again that the Grand Jury of this court returned an indictment in this court against you, wherein you were accused of the commission of the offense of murder in the first degree. You were duly arraigned upon that charge accompanied by your counsel, and entered a plea of not guilty to the charges made against you. Thereafter the matter went to trial before a jury, and on the 19th day of January of this year, that jury returned its verdict wherein they found you guilty of the offense of murder in the first degree.

Do you have any legal cause to show in this matter Mr. Clarke, why sentence should not now be imposed?

MR. CLARKE: No, Your Honor.

THE COURT: Very well. In pursuance of the statutes of the

State of Arizona, it is required that the Court return a special verdict in this case in regard to the imposition of sentence. That sentence hearing was held prior to this time.

Pursuant to Arizona Revised Statute 13-703, Subsection D, the Court now returns its special verdict in this case wherein it will set forth its findings as to the existence or non-existence of each of the circumstances set forth in Subsection F of this section, and as to the existence of any circumstances included in Subsection G of this section.

Subsection F provides for the aggravating circumstances to be considered in relation to the class one felony, murder, which has been found against the defendant.

In this case the Court finds specifically from the facts presented the following aggravating circumstances under Subsection F: First, that the defendant has been previously convicted of three separate offenses of armed robbery while he was on parole, which under Arizona law, A.R.S. 13-604.01, Subsection A, requires that the defendant be sentenced to life imprisonment.

Two, that the defendant has been previously convicted of three separate offenses of robbery involving the use or threat of violence of another person while the defendant was on parole, which under A.R.S. 13-604.01, Subsection A requires that the defendant be sentenced to life imprisonment.

Three, that the defendant in the commission of the offense, to-wit, murder, committed in the perpetration of armed robbery, knowingly created a grave risk of death to another person or persons in addition to the victim of the offense by taking a deadly weapon into a public place, to-wit, a super market, with other persons being then and there present who could have been struck by a bullet, or if they had attempted to interfere with the commission of the robbery, could have been shot by the defendant.

Four, that there is no evidence that the defendant procured the

commission of the offense by payment, or promise of payment of anything of pecuniary value.

Five, that the defendant committed the murder with the expectation of receiving something of pecuniary gain. The defendant committed the murder solely for the purpose of taking money from the cash register under the control of the victim. When the victim called for another employee, the defendant shot him and then took the money from the cash register. The expectation of financial gain was the sole cause of the murder.

Six, that the defendant committed the offense in an especially henious [sic], cruel and depraved manner. These are defined in Webster's Third New International Dictionary as follows:

Henious [sic]: hatefully or shockingly evil: grossly bad.
Cruel: disposed to inflict pain, especially in a wanton, insensate or vindictive manner; sadistic.
Depraved: marked by debasement, corruption, perversion or deterioration.

The facts presented at the trial proved that the defendant entered the store with a deadly weapon intending to rob the cashier or clerk at the check stand. That although the victim did not immediately hand over the money to the defendant upon his command, there was no resistance offered by the victim, his only resistance being the calling out the name of a fellow worker. The defendant coldly and deliberately murdered the victim for absolutely no reason except malice. This is evidenced by the defendant pointing the gun at the victim and telling him to give him the money or he would blow his head off. When the victim hesitated, the defendant deliberately and willfully shot him as he had stated he would do.

The action was cruel as it caused the victim to linger in great pain and suffering, mental as well as physical, for a period of some two weeks before he died.

Even after the shooting, the defendant displayed no panic, but

calmly took the money from the cash register and walked out the door and back to his parked car. The entire episode showed no evidence of any panic-stricken, inexperienced, immature youth, but rather the acts of a mature, sophisticated, deliberate, experienced criminal who entered into the transaction fully prepared and intending to kill if his demands were not complied with instantly.

That the defendant at the time he committed the murder was not in the custody of the Department of Corrections, a law enforcement agency or county of [sic] city jail, but was on parole from the State of California for a felony drug offense.

The Court finds specifically in regard to mitigating circumstances that:

One. The defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was not impaired to any degree.

Two. The defendant was not under any duress.

Three. There was no evidence that the defendant was legally accountable for the conduct of another person and that this provision is not applicable.

Four. There is no evidence that the defendant could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted could cause or would create a grave risk causing death to another person. To the contrary, the Court finds that the evidence supports conclusively that the defendant knowingly and intentionally took a firearm which he knew to be loaded into the store for the purpose of using it in the execution of an armed robbery, and that he should have and did foresee that the use of possession of a deadly weapon or instrument, to-wit, a loaded gun, could very well create a grave risk of death to another person or persons.

Five. The defendant's age, 30 years, with considerable time in custody for various offenses over the past 16 years does not present a mitigating circumstance.

From the foregoing facts, the Court finds that there exists five

aggravating circumstances, to-wit: Subparagraphs One, Two, Three, Five and Six of A.R.S. 13-703F.

The Court finds no mitigating circumstances as set forth in A.R.S. 13-703G, Subsection One, Two, Three, Four and Five, or under any other facts that were presented to the Court either during the trial, the sentencing hearing or contained in the presentence report.

The Court further finds beyond a reasonable doubt that the defendant personally killed and intended to kill the victim by shooting him in the head with a deadly weapon, to-wit, a firearm.

It is therefore the verdict of this Court that the defendant, Bernard Smith, shall suffer the penalty of death.

Having returned its verdict finding the defendant, Bernard Smith, guilty of murder in the first degree, and the Court having returned its verdict fixing the penalty of death, and the defendant having no legal cause to show why sentence should not be pronounced, it is the judgment of this Court that you, Bernard Smith, are guilty of the crime of murder in the first degree, and it is the sentence of the Court that you, Bernard Smith, shall suffer the penalty of death at a time and in the manner as provided by the laws of the State of Arizona.

It is further ordered that the defendant shall be delivered into the custody of the State Department of Corrections by the Sheriff of Yuma County to be kept in custody by that agency until the time for the execution of the death penalty as has been set by the Supreme Court of the State of Arizona.

The clerk of this court is directed to file a notice of appeal from the judgment and sentence herein pronounced as provided for in Rule 26.15 of the Rules of Criminal Procedure.

Supreme Court, U.S.
FILED
SEP 9 1998
CLERK

(2)

No. 98-98

In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, DIRECTOR
ARIZONA DEPARTMENT OF CORRECTIONS AND
GRANT WOODS, ARIZONA ATTORNEY GENERAL,

Petitioners,

vs.

BERNARD SMITH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION

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CAPITAL CASE

RESTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

The Ninth Circuit properly applied well-established legal principles in this case. It reached the unremarkable conclusion that Respondent (Smith) was prejudiced when his trial counsel failed to present **any** mitigating evidence at his capital sentencing hearing. The Court of Appeals correctly accorded no presumption of correctness to the state court's ruling on the "prejudice" issue because that issue is a mixed question of law and fact (the application of law to the historical facts). Finally, it analyzed the prejudice issue under the correct standard – whether there is a "reasonable probability" that trial counsel's unprofessional errors affected the outcome – and reached the correct result.

The issues for review are:

1. Was the state judge's mixed finding of law and fact on the "prejudice" issue entitled to a presumption of correctness?

2. Did the Ninth Circuit apply the correct standard in considering whether there was a "reasonable probability" that trial counsel's failure to present any mitigating evidence affected the sentence?

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RESTATEMENT OF THE CASE

The Statement of the Case by Petitioners (jointly the "State") omits a few key points.

Under Arizona law, a sentence of death is mandatory for first degree murder if there are any statutory aggravating factors present and no mitigating factors. Ariz. Rev. Stat. § 13-703(E). In this case, the State had alleged several aggravating factors and it was therefore critical for Smith's trial counsel to offer some mitigating evidence to be weighed at sentencing. Trial counsel, however, called no witnesses, offered no mitigating evidence and made no argument at the capital sentencing hearing. *See* Appendix E to Petition for Writ of Certiorari (hereinafter "State's Appendix"). As required by Arizona law, the trial judge found no mitigating factors and imposed the death penalty without the individualized weighing that is the primary requirement of a constitutional capital sentencing scheme.

In the state post-conviction proceedings, Smith showed that trial counsel failed to present readily available evidence that would have supported **nine** recognized mitigating factors. State's Appendix B. Five of those mitigating factors were established by uncontradicted evidence. *Id.* Indeed, the State's own expert witness supported Smith's claims of a change in personality following an overdose of PCP and development of a personality disorder which affected his behavior.

REASONS FOR DENYING THE PETITION

I.

THE STATE COURT'S FINDING OF NO "PREJUDICE" WAS NOT ENTITLED TO A PRESUMPTION OF CORRECTNESS.

The State's argument regarding a "presumption of correctness" fails for two reasons: (1) the finding of no prejudice is a mixed question of law and fact which is not entitled to a presumption of correctness; and/or (2) in any event, the state court applied an incorrect legal standard in its "prejudice" analysis by disregarding mitigating evidence on the grounds that the defendant could still "conform his conduct as required by law."

A. A Finding Of "Prejudice" Under Strickland Is A Mixed Question Of Law And Fact Which Carries No Presumption of Correctness.

The State argues that the conclusion that Smith's sentence would have been the same even if the mitigating evidence had been presented was a finding of "fact" entitled to a presumption of correctness under 28 U.S.C. § 2254(d). Petition at 5-9. The State cites no direct authority for this proposition because it is not the law. This Court held in *Strickland* that the issue of "prejudice" is a mixed question of law and fact which must be reviewed independently. *Strickland v. Washington*, 466 U.S. 668, 698 (1984).

The State concedes that *Strickland* held that an ineffective assistance of counsel claim is a mixed question of law and fact. Petition at 9. Nevertheless, it argues that the trial judge's "conclusion that this sentence would have

been the same was a factual finding independent of the decision of whether Smith's lawyer was ineffective and therefore entitled to the presumption of correctness." Petition at 9. The State overlooks the fact that finding prejudice, as defined by *Strickland*, consists of finding "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. For that reason, this Court expressly held: "although district court findings are subject to the clearly erroneous standard of Rule 52, Federal Rules of Civil Procedure, **both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.**" *Id.* at 698 (emphasis added). The State's theory is refuted by the very case it cites.

Even if *Strickland* had not already resolved this issue (which it has), the State's theory is contrary to decades of precedent. A mixed question of law and fact exists when a rule of law must be applied to the historical facts – as in deciding whether the facts satisfy the relevant statutory or constitutional standard. *See Townsend v. Sain*, 372 U.S. 293, 309 n.6 (1963) ("So-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations, are not facts in this sense"), *overruled on other grounds by Kenney v. Tamayo-Reeves*, 504 U.S. 1 (1992); *Thompson v. Keohane*, 516 U.S. 99, 116 S. Ct. 457, 464 (1995) (reaffirming the *Townsend* Court's definition of factual and mixed issues in relation to § 2254(d) presumption of correctness); *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982). The State admits this general rule. Petition at 5.

It is precisely this application of law to the historical facts that occurs in addressing the *Strickland* prejudice issue of whether mitigating evidence might have resulted in a different sentence under applicable law. For example, the question whether Smith suffered from a psychological disorder was a question of historical fact. The trial court's finding that Smith suffered from a psychological disorder was entitled to a presumption of correctness. Whether that psychological disorder should be considered a statutory or non-statutory mitigating circumstance, however, is a mixed question of law and fact because it requires application of law to the established facts.

The Court of Appeals did not disturb any of the trial judge's findings of historical fact. Rather, applying the law to those facts, the court concluded that the trial judge erred in not giving proper consideration to the non-statutory mitigating circumstances as required by law. The Court of Appeals was correct in refusing to accord a presumption of correctness to the state court's mixed legal and factual ruling.

B. In Any Event, The State Court Applied An Incorrect Legal Standard In Addressing The "Prejudice" Issue.

Even if the state court's determination of the prejudice issue were considered a factual finding, it still would not be entitled to a presumption of correctness because the state court applied an incorrect legal standard in making its ruling. "[I]f the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly

erroneous standard." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982). *Accord, United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963).

The state court committed legal error by considering only whether the evidence constituted mitigation as defined by Arizona's sentencing statute. That statute lists certain statutory mitigating factors, including that the defendants' "capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was significantly impaired." Ariz. Rev. Stat. § 13-703(G)(1).

The state court concluded that the available mitigating factors would not meet the requirements of this statute:

> While there is evidence from the Petitioner of his extensive use of drugs, there is no evidence that he was either (a) under the influence of drugs, or (b) that his use of drugs **affected his ability to distinguish right from wrong**, or (c) **that his use of drugs diminished his ability to conform his conduct as required by law**, at any relevant moment . . . However, if all of the information brought forth in the hearings here had been brought out at the mitigation hearing, a preponderance of the evidence would not show childhood, parental abuse, mental infirmity or **inability to understand the quality or nature of his acts or to act in conformity with the law.**

State's Appendix C at 1, 3 (emphasis added). Thus, the state court dismissed the mitigating evidence on the basis that it would not meet this statutory standard.

Both federal and Arizona courts, however, hold that mitigating evidence must still be considered even if it does not rise to the statutory level of impairing one's ability to conform one's conduct to the law. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978) ("the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *State v. Thornton*, 187 Ariz. 325, 334-35, 929 P.2d 676, 685-86 (1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1706 (1997). The Arizona Supreme Court instructs its sentencing judges:

> Even if such evidence does not meet the relevant statutory standard set forth in A.R.S. § 13-703(G), we have maintained that in order to remain faithful to *Lockett* and *Watson*, the court's inquiry may not end there. The court must consider the offered evidence further to determine whether it in some other way suggests that the defendant should be treated with leniency. In short, the trial judge must determine whether the offered evidence constitutes a **non-statutory** mitigating circumstance.

State v. Gallegos, 178 Ariz. 1, 22, 870 P.2d 1097, 1118 (1994), *cert. denied*, 513 U.S. 934 (1994) (emphasis added).

The Ninth Circuit correctly held that the state court (and the district judge) erred in dismissing the mitigating evidence on the restricted basis of the statutory test:

> We pause to mention that the issue regarding Smith's antisocial personality and his long term use of drugs is not whether those precluded him from knowing right from wrong, as the post

> sentencing court and the district court seem to have assumed. They would have to come up to that level to meet a statutorily listed mitigating circumstance. *See* Ariz. Rev. Stat. § 13-703(G)(1). They need not do so in order to be non-listed mitigators.

State's Appendix A at 11.

Even if the trial judge's finding that Smith's sentence would not have changed could be considered a purely "factual" finding, therefore, the presumption of correctness would still not apply because the state court applied an incorrect legal standard for reaching that conclusion. For both these reasons, the Ninth Circuit acted properly in refusing to give the "prejudice" ruling a presumption of correctness.

II.

THE COURT OF APPEALS APPLIED THE PROPER *STRICKLAND* STANDARD FOR FINDING PREJUDICE.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court identified two components to an ineffective assistance of counsel claim: (1) deficient performance, and (2) prejudice. This test requires a showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 699.

The State argues that the Court of Appeals failed to follow *Strickland* in its determination of "prejudice." Specifically, the State advances the novel theory that "prejudice" in sentencing can only be found where the Court of Appeals concludes that proper representation would **certainly** have resulted in a different sentence.

Petition at 10. Petitioners then argue that a lack of certainty is shown by the Court of Appeals' statements: "We do not say that any of the above considerations (non-offered or developed mitigation) were so powerful that they must have led to a life sentence rather than to a sentence of death" and "we recognize that these factors, even as now developed, do not demand a life sentence rather than a sentence of death." *See* Petition at 10. These statements, according to the State, show that there was no prejudice because the Court of Appeals is not certain the omitted evidence would have affected the outcome. *Id.*

The State's view of the law is profoundly mistaken. *Strickland* does **not** hold that prejudice exists only where errors certainly affected the outcome. On the contrary *Strickland* expressly requires that the defendant must establish only a "**reasonable probability** that, but for counsel's unprofessional errors the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). This well-established standard was properly followed by the Court of Appeals in this case. State's Appendix A at 7, (citing *Strickland*, 466 U.S. 668, 694; *United States v. Span*, 75 F.3d 1383, 1387 (9th Cir. 1996); *Clabourne v. Lewis*, 64 F.3d 1373, 1378 (9th Cir. 1995)).

Applying this standard, the Court of Appeals found there was a "reasonable probability" that the result of Smith's sentencing would have been different but for counsel's unprofessional errors. Those errors were therefore enough to "undermine confidence in the outcome." As the court noted, a "sociopathic personality defect" and "major personality change" are recognized non-statutory mitigating factors in Arizona. *See* State's Appendix A at

11 (citing *State v. Gallegos*, 178 Ariz. 1, 17, 870 P.2d 1097, 1113 (1994), *cert. denied*, 513 U.S. 934 and *State v. Rockwell*, 161 Ariz. 5, 15-16, 775 P.2d 1069, 1079-80 (1989)). Although the court found evidence of the lack of pre-planned intent to kill and good family relationships to be less compelling, the court recognized that competent advocacy could have used even these factors to paint a different picture of the defendant to the sentencing judge. *Id.* The Court of Appeals properly applied the standard of *Strickland*.

The State's argument to the contrary is based on nothing more than misleading partial quotations taken out of context. The State cites numerous cases as purportedly requiring a strict showing that a sentence **actually would have** been less severe but for counsel's deficient performance. Petition at 11-12. Actually, all of the cited cases applied the well-established "reasonable probability" standard set forth in *Strickland*; none purported to overrule that landmark decision. *See e.g., Woratzeck v. Stewart*, 97 F.3d 329, 336 (9th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2427 (1997) ("We hold that even if Woratzeck's lawyer had contacted additional family members, there is not a **reasonable probability** that Woratzeck would have received a life sentence"); *Eddmonds v. Peters*, 93 F.3d 1307, 1321, (7th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1441 (1997) ("It is **very unlikely** that inconclusive evidence of mental or emotional disturbance would have overcome this undisputable evidence that Eddmonds is a vicious and rampant sexual predator"); *Flamer v. State of Delaware*, 68 F.3d 710, 732 (3rd Cir. 1995), 516 U.S. 1088 (1996) ("Flamer has not shown that he suffered any actual prejudice, for there is

no **reasonable probability** that he would not have been convicted even if Reardon had presented a dazzling closing argument"); *Barnes v. Thompson*, 58 F.3d 971, 980 (4th Cir. 1995), *cert. denied*, 516 U.S. 972 ("even if Barnes were unable to show that El-Amin should have presented the evidence of abuse and disfunction, it is **unlikely** that he could have satisfied *Strickland's* second requirement of a '**reasonable probability**' that the outcome would have been different but for El-Amin's failure to develop this case in mitigation"); *Clozza v. Murray*, 913 F.2d 1092, 1103 (4th Cir. 1990), *cert. denied*, 499 U.S. 913 (1991) ("Having examined the evidence, Clozza contends should have been submitted, we are not left with the conclusion that there is a **reasonable probability** the result would have been different if the evidence had been presented") (emphasis added in all cases).

The Court of Appeals applied the proper standard to determine prejudice. The State's dissatisfaction with the result is not sufficient grounds for review.

CONCLUSION

The Court of Appeals properly applied well-established rules of law in deciding this case. The state court's finding on *Strickland's* "prejudice" prong is a mixed question of law and fact, and the Court of Appeals was correct in according it no presumption of correctness. In addressing that issue, the Court of Appeals applied the proper standard of whether there is a "reasonable probability" that the ineffectiveness of counsel affected the sentence.

The State's theories would misconstrue *Strickland* and trivialize the process of capital sentencing review.

For all the foregoing reasons, Respondent, Bernard Smith, respectfully urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, AND GRANT WOODS, ARIZONA ATTORNEY GENERAL,

PETITIONERS,

-vs-

BERNARD SMITH,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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STATEMENT OF THE CASE

Petitioners stand by the statement of the case as set forth in the petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

Smith argues that this Court should deny certiorari review because: (1) Judge Bradshaw's determination that even with the proffered mitigation evidence Smith would have received a death sentence was a mixed question of law and fact, and therefore not entitled to the presumption of correctness under 28 U.S.C. § 2254(d)(8); and (2) the Ninth Circuit Court of Appeals applied the proper standard of prejudice in holding Smith was entitled to a new sentencing.

Judge Bradshaw's decision that the proffered mitigation evidence would not have changed Smith's sentence was entitled to the presumption of correctness under 28 U.S.C. § 2254(d)(8) because, whether the proffered mitigation evidence would have resulted in a life sentence rested on a factual determination and not the application of facts to a principle of law. Finally, the Ninth Circuit did not require Smith to show that his sentence would have been different had the proffered mitigation evidence been presented and thereby failed to follow the prejudice requirement for finding ineffectiveness of counsel as required by *Lockart v. Fretwell*, 506 U.S. 364, 369 (1993) and *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE STATE TRIAL JUDGE—WHO WOULD HAVE RESENTENCED SMITH IN THE EVENT A RESENTENCING HAD BEEN ORDERED—THAT THE PROFFERED MITIGATION EVIDENCE WOULD NOT HAVE CHANGED SMITH'S DEATH SENTENCE RESTED ON FACTUAL DETERMINATIONS AND NOT THE APPLICATION OF FACTS TO A PRINCIPLE OF LAW AND THEREFORE WAS ENTITLED TO A PRESUMPTION OF CORRECTNESS UNDER 28 U.S.C. 2254(D)(8).

In his post-conviction hearing, Smith argued he was entitled to a new sentencing because his trial counsel was ineffective. For Smith to obtain a resentencing on the grounds of ineffective assistance of counsel, he had to demonstrate prejudice. *Strickland*, 466 U.S. at 687; *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033 (9th Cir. 1997) (defendant unable to show prejudice when attorney chose not to call witnesses). Smith had to show that, if his trial counsel had presented the proffered mitigation evidence, his sentence would have been life instead of death.

Judge Bradshaw conducted a 4-day evidentiary hearing to determine whether Smith was entitled to a new sentencing on the grounds his trial counsel was ineffective by failing to present mitigation evidence.[1] During the evidentiary hearing, Smith called witnesses—both expert and lay—who testified regarding the areas of mitigation that Smith claimed his trial counsel was remiss in failing to present at his sentencing. After observing these witnesses testify, Judge Bradshaw concluded that, even if this evidence had been presented at Smith's sentencing hearing, the sentence still would have been death. (Appendix C, at 2–4.) In effect, Smith was given a new sentencing hearing before Judge Bradshaw, who would have resentenced Smith, in the event a resentencing had been ordered. *See* Rule 32.4(e) of the Arizona Rules of Criminal Procedure; *Gerlaugh*, 129

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1. Smith also asserted his trial counsel was ineffective at the guilt phase. (Appendix A, at 16–18.) This claim was rejected by the Ninth Circuit Court of Appeals. (*Id.*)

F.3d at 1036; *State ex rel Corbin v. Superior Court*, 675 P.2d 1319, 1322 (Ariz. 1984).

Judge Bradshaw's finding was a factual determination because the outcome depended on the credibility of the witnesses Smith presented to establish the existence of mitigating evidence justifying a life as opposed to a death sentence. Issues whose determination hinge on questions of credibility of witnesses as opposed to applying facts to legal principles are considered historical facts, which are entitled to presumptions of correctness under 28 U.S.C. § 2254(d)(8). *Thompson v. Keohane*, ___ U.S. ___, 116 S. Ct. 457, 465 (1995). Therefore, Judge Bradshaw's determination should have been afforded the presumption of correctness under 28 U.S.C. § 2254 (d)(8). *See Gerlaugh*, 129 F.3d at 1036. (court of appeals refused to remand the matter back to the state court for resentencing after post-conviction judge, who was also the trial and sentencing judge, concluded the new mitigation evidence would not have changed the sentence he imposed.).

Respondents disagree with Smith's contention that the trial court used an improper legal standard in determining whether sufficient mitigation was presented to warrant a life sentence. Smith argues that the trial court improperly rejected his proffered mitigation evidence of anti-social personality and long term drug use because the trial court concluded they did not impair Smith's ability to conform his conduct to law and therefore could not be considered as mitigation under A.R.S. § 13–703(G)(1). First, the Arizona Supreme Court, in rejecting the claim that a defendant's prior substance abuse did not present sufficient mitigation to vitiate the imposition of the death penalty, has used language similar to that employed by Judge Bradshaw. *See e.g. State v. Murray*, 906 P.2d 542, 576 (Ariz. 1995) (defendant "failed to show alcohol or illicit drugs impaired his ability to appreciate wrongfulness or conform his behavior to the requirements of the law").

Second, when imposing a death sentence, the trial judges are "are presumed to know the law and to apply it in making their decisions." *Walton v. Arizona*, 497 U.S. 639, 653 (1990). Third, while the Constitution demands that the sentencer consider the proffered mitigation, the Constitution does not compel the sentencer to view the mitigation the way the defendant wants it to be viewed, or to give it the weight the defendant believes it should be accorded. *Eddings v. Oklahoma*, 455 U.S. 104, 114–15, 117 (1982).

Here, as noted by Judge Broomfield, Judge Bradshaw obviously considered the fact that Smith had an anti-social personality:

> At the post-conviction hearing, Dr. Simonis and Dr. Bendheim agreed that Petitioner had an anti-social personality disorder. Both stated that a person with such a disorder is able to distinguish right from wrong but often wilfully decides to do wrong out of self-interest.[2]

(Appendix B, at 7.)

Moreover, courts are not required to find that an anti-social personality constitutes mitigation, thereby mandating the imposition of life as opposed to a death sentence. *Harris v. Pulley*, 885 F.2d 1354, 1383 (9th Cir. 1988); *Gerlaugh*, 129 F.3d at 1034, citing *State v. Richmond*, 560 P.2d 41, 52–53 (Ariz. 1976) (mere character or personality disorder like sociopathy is not alone sufficient to constitute a mitigating circumstance). Judge Bradshaw also considered Smith's "extensive use of drugs." (Appendix C, at 1.) *See State v. Bible*, 858 P.2d 1152, 1212 (Ariz. 1993) (We do not believe that defendant's habitual drug use is of any value as mitigation in this case, given the fact that there was no evidence it significantly impaired his capacity to control his conduct on the day in question.). Thus, Judge Bradshaw considered Smith's anti-social

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2. Judge Broomfield also rejected Smith's argument that his anti-social personality disorder constituted mitigation warranting a life sentence:

> The doctors' testimony at the post-conviction hearings established that Petitioner has an anti-social personality disorder. However, both doctors also testified that a person with such a disorder is able to distinguish right from wrong but often *wilfully decides to do wrong out of self-interest. Such evidence has very little or no mitigation value*. In addition, the state court found that Petitioner had no "mental impairment" at the time of the offense.

(Appendix B, at 10; emphasis added.)

personality and long term drug use, but concluded that these factors, along with the other areas of proffered mitigation, did not warrant a life sentence.

The Ninth Circuit Court of Appeals failed to afford Judge Bradshaw's factual determination—that even with the proffered mitigation evidence Smith would have received a death sentence—the presumption of correctness due it under 28 U.S.C. § 2254(d)(8). The court's failure to follow the presumption of correctness doctrine added years to the process and undermined the finality of the State's judgment.

II

BECAUSE THE NINTH CIRCUIT COURT OF APPEALS DID NOT FIND THAT THE PROFFERED MITIGATION EVIDENCE WOULD LIKELY RESULT IN A LIFE RATHER THAN DEATH SENTENCE, THE COURT FAILED TO FOLLOW THE PREJUDICE STANDARD OF *STRICKLAND V. WASHINGTON.*

Petitioners disagree with Smith's argument that the Ninth Circuit applied the proper prejudice standard in granting Smith a new sentencing. The Ninth Circuit did not require, nor did Smith show, that the proffered mitigation evidence would have resulted in a life as opposed to a death sentence. In order to obtain relief on the basis of ineffective assistance of counsel, the defendant must show the ineffectiveness of his counsel and resulting prejudice. *Strickland*, 466 U.S. at 686. To establish prejudice, the defendant must show that the result would have been different. *Darden v. Wainwright*, 477 U.S. 168, 184 (1986).

Both Judge Bradshaw and Judge Broomfield concluded that Smith did not show that his sentence would have been other than death even if the proffered mitigation evidence had been presented. (Appendix B, at 9–11; Appendix C, at 2–4.) Despite the above findings and the Ninth Circuit Court's conclusion that the proffered mitigation evidence "did not demand a life sentence rather than a sentence of death," the court still granted Smith a new sentencing. (Appendix A, at 12.)

Finally, Judge Bradshaw, who had the opportunity to observe and evaluate the witnesses Smith called for the purpose of establishing mitigation, concluded that even if the proffered mitigation evidence had been presented, the sentence would have been the same. (Exhibit C,

at 2–4.) Judge Bradshaw is the person who would have resentenced Smith had the newly-presented evidence of mitigation been deemed to be significant. Judge Bradshaw had only two choices: a life or death sentence. He alone had to make that decision. Thus, Judge Bradshaw's ruling that the death sentence would have been imposed even if the evidence had been presented is dispositive under *Strickland* and under any other prejudice standard.

Thus, the Ninth Circuit disregarded the prejudice standard of *Strickland* and its progeny by not requiring Smith to demonstrate that his sentence would have been life had the proffered mitigation evidence been presented.

CONCLUSION

Petitioners respectfully request this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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